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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in the above-entitled case on January 11, 1963. That court addressed itself more specifically to the issues here presented in an opinion on petitioner's motion for rehearing entered on July 12, 1963.

OPINIONS BELOW

The opinion of the Court of Claims entered on January 11, 1963, is printed in Appendix A hereto, *infra*, p. 2a, and is reported in 312 F. 2d 418. The opinion on the motion for rehearing and reargument entered on July 12, 1963, is also printed in Appendix A hereto, *infra*, p. 69a, but is unreported (No. 56-59, Ct. Cl.).

JURISDICTION

The final judgment of the Court of Claims was entered on July 12, 1963, when it rendered its opinion denying petitioner's timely motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255 (1958).

QUESTIONS PRESENTED

Petitioner seeks, on its own behalf and on behalf of its specified subcontractors, as damages the profits which it and its subcontractors would have realized had the performance of its Capehart housing contract not been prevented by respondent's unjustified termination of the contract. The contract contained no article allowing termination for the convenience of the Government. It did contain, however, all the articles set forth in the housing contract form approved by the Assistant Secretary of Defense (Properties and Installations) and the Federal Housing Commissioner as required under the Capehart Act. Section 8.703 of the Armed Services Procurement Regulations (hereinafter referred to as "ASPR") in effect on the date of the execution of this Capehart housing contract, provided that a specified Termination for the Convenience of the Government article shall be inserted in certain fixed-price military department construction contracts. No similar termination article was prescribed for use in military construction subcontracts or for use in Capehart contracts.

The Court of Claims held that section 8.703 of ASPR required, as a matter of law, the inclusion in petitioner's Capehart housing contract of the military article providing for the termination of construction contracts for the convenience of the Government and for that

reason neither the petitioner or its subcontractors were entitled to recover their anticipatory profits as part of their damages for the wilful breach of contract by the Government.

The questions presented are as follows:

1. Whether a contract form drafted and approved pursuant to the Capehart Housing Act and adopted by the parties as their contract is the sole source of their mutual rights and obligations under that contract, or whether the contract must include, as a matter of law, a provision set forth in a regulation (section 8.703 of ASPR) promulgated for the internal management of the military departments even though the provision was deliberately omitted from the contract form by the parties?

2. Whether section 8.703 of ASPR has the force and effect of law and, if it does, whether ASPR and section 8.703 thereof are applicable to contracts which are—by the express language of ASPR excluded from the operation of ASPR?

3. Whether a procurement regulation that only pertains to prime contracts has any legal effect on subcontracts?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth to the extent indicated below in Appendix B, *infra*. Among them is the Capehart Act which is the popular name for Title IV of the Housing Amendments of 1955, ch. 783, 69 Stat. 646-54, 84th Cong., 1st Sess., as amended by Title V of the Housing Act of 1956, ch. 1029, 70 Stat. 1109-12, 84th Cong., 2d Sess., now found in slightly changed and codified form in 12 U.S.C. secs. 1748-1748g, 1720f (1958) and 42 U.S.C. secs. 1594-1594f

(1958). It is not deemed necessary to set forth the entire Act, but it is discussed and explained herein starting on p. 22, *infra*. One pertinent section is set forth in Appendix B, *infra*.

The pertinent provisions of Section VIII of ASPR are also set forth in Appendix B. This section of these Regulations in effect at the time of the execution of this contract, was issued under the authority of 5 U.S.C. sec. 22, which is set out in Appendix B. Section VIII was also issued to interpret or apply the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21, 80th Cong., 2d Sess. This Act, discussed by the Court of Claims, is found, as slightly changed and codified in 10 U.S.C. secs. 2301-14 (1958). This Act as codified is set forth in its entirety in Appendix B.

STATEMENT

The facts as stated in the Findings of Fact and as found by Commissioner Mastin G. White of the Court of Claims, Appendix A, *infra*, p. 20a, are not contested by petitioner.

Petitioner was the prime contractor on a Capehart Act housing project contemplating the construction of 2,000 dwelling units for the long-range needs of military personnel at Fort Polk, Louisiana. The contract consisted of the terms and provisions previously approved by the Federal Housing Commissioner and by the Assistant Secretary of Defense (Properties and Installations). On the first page of the contract under "STATUTORY AUTHORITY" it is specifically stated that the contract is authorized by the statutory provisions that are commonly referred to as the Capehart Act. No other statutory authority was referenced.

In 1958 respondent unilaterally cancelled the contract. Since private funds had to be used to finance the construction of a Capehart housing project and since the military department was required by statute to certify to congressional committees a long-term need for the military housing, no need was felt to include a Termination for Convenience of the Government article in the standard Capehart housing contract form. Consequently, the Capehart housing contract involved in this litigation does not contain any provision for suspension or termination of the work for the convenience of the Government. Respondent does not dispute this fact; actually respondent attempted on numerous occasions to obtain an agreement with petitioner to modify the contract by incorporating therein the termination procedures specified in Section VIII of ASPR. Petitioner rejected all such attempts. The parties, however, did settle by negotiations most of the outstanding items of damages resulting from respondent's unilateral cancellation of the contract. A few relatively small items of cost and the item of anticipated profits for petitioner and certain subcontractors could not be settled by negotiations.

Petitioner filed a timely petition in the Court of Claims under its jurisdiction as set forth in 28 U.S.C. sec. 1491 on behalf of itself and certain of its subcontractors to obtain payment of anticipatory profits and certain costs. The Commissioner found and recommended in his Report that petitioner and its specified subcontractors be awarded anticipatory profits and certain items of cost. After receiving the Commissioner's Report and hearing oral argument on December 5, 1962, the Court of Claims issued on January 11, 1963 a tripartite opinion together with findings of fact and con-

clusions of law which are set forth in Appendix A, *infra*, pp. 2a-68a. In the second part of the opinion (Appendix A, *infra*, pp. 10a-19a) the court refused to allow recovery for the anticipated profits of petitioner or of any of the subcontractors which normally would be allowable at common law for breach of contract. The court concluded that the Termination for Convenience of the Government article set forth in section 8.703 of ASPR was incorporated as a matter of law into petitioner's Capehart housing contract. Petitioner does not contest the first or third parts of the opinion nor the basic findings of fact.

Believing that the doctrine enunciated in the second part of the opinion was not only erroneous and novel, but was also a dangerous precedent, petitioner moved on the basis of a supporting brief for rehearing and reargument. The novelty of the court's position is evidenced by its own admission in the second opinion that none of the parties applied the convenience termination article in their administrative settlements and that the case was not tried on that principle. (Appendix A, *infra*, p. 69a.) On July 12, 1963, the Court of Claims rendered a detailed opinion rejecting petitioner's motion and holding again that section 8.703 of ASPR had the force and effect of law and hence must be read into this Capehart housing contract, regardless of the intent of the parties or the wording of the contract. This was the court's conclusion despite the fact that the Armed Services Procurement Regulations apply only to contracts (1) involving appropriated funds and (2) entered into under the authority of the Armed Services Procurement Act of 1947. The Capehart housing contract in question neither involved appropriated funds nor was it entered into under the Armed Services Procurement Act of 1947.

The novel decision below is not only erroneous but is so far reaching in its impact that this Court should review and reverse for the following reasons: (1) The decision below conflicts with landmark decisions of this and other courts; (2) it has already caused damaging confusion and uncertainty in the federal government's multi-billion dollar military procurement program; (3) it determines that other statutes which authorize contracts are subservient to the Armed Services Procurement Act regardless of subject matter; (4) it holds that Section VIII has the force and effect of law when there is no statutory grant; (5) it conflicts with decisions of this and other courts in applying ASPR to Capehart Act housing contracts; and, finally, (6) it holds that the provisions required by section 8.703 of ASPR must be included retroactively in contracts with subcontractors who were not in privity with the Government.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Landmark Decisions of This Court in the Field of Government Contracts

This Court has always recognized that damages for breach of contract by the Government include the loss of anticipatory profits. The rule was firmly established in one of the oldest decisions applicable to Government procurement in *United States* v. *Speed*, 75 U.S. 77 (1868). That rule has been followed by this Court and other courts without exception until the Court of Claims rendered the decision below. The factual and legal situation in the *Speed* case is very similar to that in the case below. Speed contracted with the Government on October 27, 1864 (in wartime) to slaughter and pack 50,000 Government-furnished hogs. The Government delivered 16,107 hogs but owing to the very high price of hogs the Contracting Officer with the

approval of the Commissary-General gave up the enterprise and refused to furnish to Speed the remainder of the 50,000 hogs. The contract did not contain a provision that it could be terminated at such times as the Commissary-General should direct. The absence of such a provision is significant because Rule No. 1179 of the Army Regulations prescribed by the Secretary of War and effective at the time of the execution of the Speed contract provided:

> *These agreements* [contracts for subsistence stores] *shall expressly provide for their termination at such time as the Commissary-General may direct.* [Emphasis added.]

75 U.S. at 77. This Army regulation was issued under the authority of ch. 40, § 7, 3 Stat. 427 (1818) which specifically provided that contracts for Army supplies shall be made under regulations prescribed by the Secretary of War; unlike the regulation herein involved, it obviously had the force and effect of law. Among the arguments made by the Government against possible liability for common-law damages was the following:

> 3. If the want in this contract of the provision for its termination at such time as the Commissary-General shall direct, does not vitiate the contract, it must be held that the contract will be treated as *containing* the *clause*, inasmuch as the law requires that it should contain the clause.

Id. at 80.

That contention is very similar to the Court of Claims' holding in the case below. However, in the *Speed* case this Court rejected that argument and granted Speed recovery of the anticipatory profits that he would have earned had the Government not improperly terminated his contract. It is important to note

that this Court in so holding gave a very narrow meaning to "subsistence stores" in order to avoid the application of the statutory regulation. It then said the Government could have insisted on the contract provision required by the Regulation but since it did not do so, it could not have the benefit of it as thought it had.

The *Speed* decision, arising out of a wartime contract is the cornerstone for the rule and policy followed in this country for over a century of allowing anticipatory profits as part of the damages the Government must pay for unjustified termination of a contract unless limited by a contract provision or statute. The Government procuring agencies have always recognized this and so advise in their official publications. See Appendix C, *infra*, pp. 104a-105a. The court's holding in the decision below is the first decision contrary to that century-old rule and policy.

The unbroken chain of precedents that followed the doctrine of the *Speed* case include such other landmark decisions as: *United States* v. *Behan*, 110 U.S. 338 (1884); *United States* v. *Spearin*, 248 U.S. 132 (1918); *S. Harvey Klein, Assignee* v. *United States*, Ct. Cl. Docket No. 20-56, 285 F. 2d 778 (1961).

It is most important that this Court reaffirm the *Speed* rule by review and reversal of the decision below.

2. The Decision Below Has Caused Damaging Confusion, Uncertainty and Instability in the Federal Government's Multi-Billion Dollar and All-Pervasive Military Procurement Program

The federal government's annual military procurement program exceeds fifty billion dollars. As a result of the unprecedented decision below, the entire military procurement program is seriously endangered because

no longer can any one define the rights of the parties under military procurement contracts.

Since the founding of this country, the military departments have contracted on the basis of the mutual agreement of the parties; that will no longer be true unless the decision below is reversed. What the decision below says to the world of Government contractors is simply: The contract form which the Government draws up in the first instance pursuant to a statute to meet its needs and which both parties sign does not represent the agreement of the parties and the extent of their liabilities and obligations.

If petitioner could not rely with certainty as to what its contractual rights and obligations were under its Capehart housing contract, what could it have done to obtain certainty? It would not have been enough if the Secretary of Defense had personally signed the contract since the approval of his *alter ego*, the Assistant Secretary of Defense (Properties and Installations) as well as the Federal Housing Commissioner was evidently not adequate.

The original amount of the contract was approximately thirty-three million dollars. Rights and obligations under such a sizeable contract cannot be assumed lightly or under doubt. If petitioner had consulted any of the chief legal officials of any of the military departments, it would have been advised that it was enfitled to common-law damages in the event its Capehart housing contract was unilaterally cancelled by the Government. The military departments, as well as the General Services Administration, have for years published such advice; extracts taken from their publications are set forth in Appendix C, *infra*, pp. 104a-105a).

The decision below has the effect of converting procurement via agreement by the parties to procurement by regulation. Instead of being governed by a contract, the parties will be bound by a "rule-book." A contractor, however, will not have a voice in the drafting of the rules; he will in fact have extreme difficulty in ascertaining what is in the "rule-book." Not only does ASPR cover hundreds of pages, but under section 1.108 of ASPR, the military departments and procuring activities therein are authorized to issue their own implementing regulations to the ASPR. The issuance of none of these regulations is subject to the rulemaking safeguards of the Administrative Procedure Act (5 U.S.C. sec. 4) and very few of them are published in the Federal Register. Hence, most government contractors do not have access to them. The adverse effect of this on federal Government contractors and Government officials is widely recognized. The *Government Contractor*, published by Federal Publications, Inc., (5 GOVT. CONT. ¶ 57 (1963)) made the following comment:

> Moreover, from a practical standpoint the burden which the instant decision imposes on contractors might well prove to be intolerable. If carried to its possible extreme, for example, the decision could require a prospective contractor to search not only the entire ASPR, but the implementing regs of the particular military service with which he is contracting (AFPI, APP or NPD), in order to determine exactly what his contractual obligation may be—even though the *contract itself* contains *no references* to any portions of these regs. Such a task might involve "hairline" determinations by contractor as to whether particular provisions of the regs are—or are not—applicable to his contract. Illustrative of this is the instant case

> itself, wherein it was certainly not free from doubt that ASPR applied to Capehart contracts . . . .

Confusion and uncertainty is not only the lot of contractors; Government representatives also share in it. The Court of Claims has said that clauses prescribed by ASPR are automatically included; no longer does the appropriate Government official have the discretion to omit a clause if it is not in the best interests of the Government to have it included. The decision of the court below can obviously be used against the Government when the omitted clause is favorable to the contractor. *E.g., School District 2 Fractional* v. *United States*, 229 F. 2d 681 (6th Cir. 1956).

The distaste of the Government for the rule announced in the decision below is shown by the fact that responsible government agencies have failed to follow it. *Homer Electric Assn., Inc.*, ASBCA No. 7649, 1962 BCA ¶ 3608; *Aero Corp.*, ASBCA No. 8178, 1963 BCA ¶ 3665; Comp. Gen. B-151787, Sept. 3, 1963. The confusion resulting from the failure of the Comptroller General to apply the rule of the decision below in the above latter case (B-151787) was discussed in the *Government Contractor* (5 GOVT. CONT. ¶ 442) where the inability to reconcile the two decisions was noted. If the Termination clause was included into the contract by the court below because (a) section 8.703 of ASPR requires its inclusion and (b) that section has the force and effect of law, then the editor asked, why did not the Comptroller General read certain prescribed clauses into the bid invitations. Especially decried was "the broad sweep which the *Christian* decision gives to the 'force of law' concept." In conclusion the editor said:

> Things seem to be getting very confusing for contractors. Simply determining which clauses a

> contract contains—a matter which used to be ascertainable by the straightforward method of reading the words of the contract itself—has now become a major project based partly on guesswork. The mere statement of this Alice-in-Wonderland situation, without further elaboration, would seem to be sufficient to indicate that reforms are needed.

The editors of the *Government Contracts Reporter*, published by Commerce Clearing House, Inc., have also questioned the results of the decision below, and stressed the need for further court clarification. This Commerce Clearing House comment is set forth in full in Appendix C, *infra*, pp. 105a-107a.

Further confirmation of the fears and dangers of the impact of the decision below is shown by the excerpts taken from the very thorough commentary on it published in the Georgetown Law Journal (51 GEO. L.J. 842 (1963)) and set forth in Appendix C, *infra*, pp. 107a-109a.

The harmful impact of the decision below is especially grave to the small contractor who cannot afford the cost of a large legal department or the constant services of legal specialists in Government contracts. The small contractor can read and understand the regulations concerned with the technicalities of his trade or business and he can read his contract which used to inform him of his legal obligations. He cannot, however, afford the services of the large legal department now required to ascertain just what is included from the thousands of pages of regulations into his contract by operation of law. As a practical matter, the decision below places the small business man at the mercy of the Government.

It is most important that it be determined by this Court whether it is necessary that the federal govern-

ment's multi-billion dollar military procurement program be conducted on a "guesswork" and in an "Alice-in-Wonderland" atmosphere.

3. Determination Should Be Made of the Conflict Between the View of Petitioner and the Military Department Officials That the Capehart Act Takes Precedence Over the Armed Services Procurement Act and the View of the Court of Claims Expressed in the Opinion Below That the Armed Services Procurement Act Is an Over-all Procurement Statute Which Takes Precedence Over All Statutes That Even Affect Military Procurement

The Capehart Act specifically provides (42 U.S.C. sec. 1594), that the "Secretary of Defense *or his designee* is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing . . . ." [Emphasis added.] It also provides that any "such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States . . . ." Thus, authority was given to the Secretary of Defense to approve the content of the Capehart housing contract form. The Capehart Act does not state that the *terms* and *provisions* of such a contract must be consistent with or subject to the requirements of any other statute or regulation.

The Capehart housing contract involved in this litigation was awarded as the result of formal advertising and in all respects met the requirements of the Capehart Act. [The only limitation on the authority of the Secretary of Defense set forth in the Capehart Act was that he *advertise* properly in accordance with the mandates of the Armed Services Procurement Act.] Notwithstanding such statutory compliance, the decision below holds that the convenience termination article prescribed by section 8.703 of ASPR is incor-

porated as a matter of law into this Capehart housing contract.

This conclusion in the decision below is based upon the false premise that the Armed Services Procurement Act had an over-all broad procurement purpose overriding the provisions of the Capehart Act. The Court of Claims erroneously describes the former as "general legislation empowering, in broad terms, a government agency to procure and to make contracts normally . . . [covering] all phases of that process—from the solicitation of bids or proposals, to the making of the contract, through its administration and performance, to its completion or termination." (Appendix A, *infra*, p. 71a.) The Armed Services Procurement Act is not a general procurement statute; it is a specific and limited statute. It deals principally with the requirement that contracts be let by formal advertising and the exceptions when procurement by negotiation is permitted. There are also provisions concerned with the small business preference, ban on cost-plus-percentage-of-cost contracting, advance payments, delegation of responsibility in letting contracts, and the role of the Comptroller General. Two short excerpts from its legislative history (one from the Senate Report and the other from the House hearings) are included in Appendix C, *infra*, pp. 92a-100a. Both excerpts show unequivocally that the Act concerns the problem of when procurement must be made by formal advertising procedures and when by negotiation. Even a bare perusal of the Act, Appendix B, *infra*, pp. 88a-97a) conclusively shows this; the Act has nothing to do with the general terms and provisions of a contract.

The decision below means that the Secretary of Defense can no longer draft a contract form or negotiate

a favorable contract under any statutory authority if the provisions thereof conflict with any one of the thousands of procurement regulations which might in some sense be said to have the force and effect of law. The Court of Claims conclusion in the decision below is a radical break with the past and contrary to the whole development of Government contract law. Absent the clearest statutory language, such a result should not be defined as the intent of Congress and allowed to remain.

4. The Determination in the Opinion Below That Section 8.703 of ASPR Has the Force and Effect of Law, Is Erroneous and Contrary to a Well-Established Construction Given by the Administrative Officials Charged With Its Enforcement

Section VIII of ASPR, of which section 8.703 is a part, was not in fact issued pursuant to statutory authorization and does not have the force and effect of law. When the Capehart housing contract involved in this litigation was executed, Section VIII then in effect (17 Fed. Reg. 1791 (1952), as amended, 32 C.F.R. sections 8.100-717.7 (Rev. 1954, Supp. 1957)) stated that it was issued under the authority of 5 U.S.C. sec. 22. See statement of authority quoted in Appendix B, *infra*, p. 98a. Title 5 U.S.C., sec. 22, authorizes the head of each department to prescribe regulations for the internal governing of his department and the preservation of records. See Appendix B, *infra*, pp. 87a-88a. It was first enacted in 1789 to permit the new administrative offices to organize themselves. As the Committee on Government Operations of the House of Representatives stated, when it considered adding the last sentence to prevent the withholding of information:

> The law has been called an office "housekeeping" statute, enacted to help General Washington

get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents.

H.R. Rep. No. 1461, 85th Cong., 2d Sess., 1958 U.S. Code Cong. & Admin. News 3352. As this Court has said, it conveys administrative power only and not legislative. *United States* v. *George*, 228 U.S. 14, 20 (1913). It confers no authority to "make rules for the conduct of persons not connected with the Departments . . ." 17 *Ops. Atty. Gen.* 524, 525 (1883).

In addition to being issued under the authority of the above Act, Section VIII of ASPR states that it is interpreting or applying the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21, 80th Cong., 2d Sess., now found as slightly changed and codified in 10 U.S.C. secs. 2301-14 (1958). See again statement of authority quoted in Appendix B, *infra*, p. 98a. As was stated hereinbefore the Armed Services Procurement Act of 1947 is a specific and limited statute.

This, then, is the statutory framework in which the question is presented: Can the direction to contracting officers to place a Termination for the Convenience of the Government article in certain contracts which is contained in a regulation made within the above statutory framework, be said to have the force and effect of law?

Before a regulation can be said to have the force and effect of law, it must not only be issued under the authority of a statute but it must also be within the scope of the congressional grant of power of that statute. See, *e.g.*, *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944). Section VIII of ASPR is issued under the authority of the office housekeeping

statute (5 U.S.C. sec. 22) and interprets the Armed Services Procurement Act of 1947. Even if the fact that the regulations are issued pursuant to 5 U.S.C. sec. 22 does not limit the force to the internal workings of the agency,[1] the regulations must still be confined within the scope of or be "reasonably adapted to the enforcement of" the Armed Services Procurement Act of 1947. See *Maryland Cas. Co.* v. *United States*, 251 U.S. 342, 349 (1920).

Evidently, cognizant of that requirement, the military departments issued the first three sections of ASPR (first published as Parts 851-53 of 10 C.F.R. on June 9, 1948, 13 Fed. Reg. 3074) with a very illuminating foreword. This foreword, which contains a letter from the President to the Secretary of Defense, is set forth in its entirety in Appendix C, *infra*, pp. 100a-101a. It states that the purpose of the regulations which should be issued under the Armed Services Procurement Act of 1947 is to assure the placing of contracts with small business concerns and to specify the circumstances when the general policy of advertising for bids may be waived.

With apparent regard for the limitations imposed by the statutory framework, Sections I-III, inclusive, of ASPR are generally within the statutory grant of power and most of the provisions within them can be said to have the force and effect of law.[2] (The first

[1] The Armed Services Procurement Regulations were not then and are not now issued pursuant to 10 U.S.C. secs. 3012, 6011, and 8012 (1958).

[2] The decisions of this Court in Paul v. United States, 371 U.S. 245 (1963) and Public Util. Comm. v. United States, 355 U.S. 534 (1948) dealt with regulations found in Sections I and III of ASPR.

three sections concern the following matters: I—General Provisions, II—Procurement by Formal Advertising, and III—Procurement by Negotiation.)

However, Section VIII on Termination of Contracts is so unrelated to these statutes that no attempt was made to issue it for over three years. Meanwhile, the Department of Defense supported legislation in 1948 (S-2450, 80th Cong., 2d Sess. (1948); H.R. 6152, 80th Cong., 2d Sess. (1948)), to establish a statutory basis for the government's convenience termination of contracts. In all essential respects the two bills were an adaptation for permanent use of the Contract Settlement Act of 1944, 58 Stat. 649, 78th Cong., 2d Sess., which was no longer effective. (Report of Comptroller General, B-75551, May 14, 1948.) For various reasons, including an unfavorable report by the Comptroller General, neither bill was reported out of committee.

Finally, on February 29, 1952, after all efforts to obtain peacetime termination legislation had failed, the Department of Defense issued Section VIII without any comment or foreword. 17 Fed. Reg. 1791. As Professor Covington Hardee of Harvard Law School, consultant to the Office of the General Counsel, Department of the Air Force, has said Section VIII has no statutory basis:

> The Contract Settlement Act of 1944 applied only to military contracts related to the prosecution of World War II. There is no statute in effect today governing termination procedures. But the ASPR devotes a full and detailed section to setting forth a prescribed method of handling the termination problem. *Since this section has no statutory warrant, termination pursuant to it seems to depend on the insertion in each contract, either ini-*

tially or by amendment, of the termination article provided for in Section VIII. [Emphasis added.]

Hardee, *Termination of Military Contracts*, 32 TEX. L. REV. 172, 176 (1953).

Even more important, official publications of the three military departments have repeated this obvious point and have stated unequivocally that the provisions of Section VIII apply only where there is a convenience termination article in the contract. Contractors shared these views of the military departments and their view has been recorded in a formal document of the Chamber of Commerce. Pertinent excerpts of all these documents are set out in Appendix C, *infra*, pp. 101a-103a.

The Secretary of Defense also shared the above views. Section VIII (section 8.101 (32 C.F.R., Rev. 1954)) provided that contracts not containing a convenience termination article or containing a convenience termination article different from the standard article may be modified to include a standard article. As shown by sections 8.101 and 8.102, *Section VIII applied only to contracts containing the standard convenience termination articles.* By its own terms, the requirements of Section VIII do not apply to this contract. Both sections 8.101 and 8.102 have been included in Appendix B, *infra*, p. 98a.

Only the Court of Claims in the decision below has said that Section VIII has the force and effect of law to the extent that it is automatically a part of this Capehart housing contract or any military procurement contract. The Court of Claims, nevertheless, is the tribunal which has exclusive jurisdiction over all

contractual claims in excess of $10,000 against the United States.

This Court has firmly established the rule that the construction of a regulation by the administrative agency which issued it (see sections 8.101 and 8.102 of ASPR) must be given controlling weight unless clearly erroneous. *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1945). The Court of Claims has given this construction no weight.

It is necessary that this Court review and reverse the decision below in order to reinstate confidence in Government contractors that they can rely upon the military departments' construction of their own regulations. It is also necessary that this Court should take this opportunity to reaffirm the doctrine of *Addison* v. *Holly Hill Fruit Prods., Inc.*, *supra*, and other cases; and to caution administrative agencies and departments that in their zeal to govern by regulation, they are limited to the scope of the statutory grant of power.

5. Even If Section VIII of ASPR Has the Force and Effect of Law, Its Application to This Capehart Housing Contract Conflicts With the Decisions of This Court and Other Courts

The board application given to Section VIII in the decision below is manifestly erroneous and can only be corrected as a practical matter by this Court's reversal of the decision below. The effect of Section VIII is limited to contracts entered into under the Armed Services Procurement Act of 1947 and which obligate appropriated funds. Neither prerequisite was present in this case.

Section 8.100 (see Appendix B, *infra*, p. 97a) clearly provides that Section VIII only applies to "termina-

tion of contracts of any Department entered into under the Armed Services Procurement Act of 1947 . . . ." However, as pointed out hereinbefore, the Capehart housing contract involved in this litigation states that it is made under the authority of the Capehart Act and 42 U.S.C. sec. 1594 (1958) of that Act does provide its statutory basis.

As further proof of Section VIII's inapplicability, section 1.402 (applying to the entire ASPR) specifically states that such Regulations apply only to contracts which "obligate appropriated funds." See Appendix B, *infra*, p. 97a. In *Paul* v. *United States*, 371 U.S. 245, 247-48, 263 (1963), this Court sanctioned the application of ASPR and the consequent federal control only with respect to milk *purchased with appropriated funds*. The decision below now conflicts with that holding. This Capehart housing contract did not "obligate appropriated funds." The latter phrase connotes present obligation, liability or restriction and this Court has said that it requires the existence of an appropriation. *Sutton* v. *United States*, 256 U.S. 575 (1921).

Briefly, Capehart Act projects require the submission of bids by, and the letting of contracts to, "eligible builders." Such bidders agree to form a corporation which, after the award, leases the land from the Government, arranges for Federal Housing Administration guaranteed private mortgage loans, and lets the housing construction contract. Payments are made under the housing contract to the builder solely from the mortgage proceeds. Upon completion of the housing contract, the stock of the corporation is turned over to the military department which also assumes the mortgage and pays it off over a period of years from

quarters allowances appropriated for military personnel. See footnote 9 in the first opinion below, Appendix A, *infra*, p. 13a.

Obviously, then, the *construction* under the Capehart housing contract is carried on by the use of private capital. The Department of Defense very carefully distinguishes between Capehart Housing and Appropriated Fund Housing. Furthermore, the legislative history of the Capehart Act makes the distinction very clearly and shows that the *construction* of the housing was to be paid from mortgage proceeds and not from appropriated funds. See Appendix C, *infra*, p. 103a. The Court of Claims appeared satisfied that because the mortgages would be eventually paid from quarters allowances and that since appropriated funds were "importantly involved", ASPR would apply. See first opinion below, Appendix A, *infra*, p. 15a. Notwithstanding, this Capehart housing contract *did not* obligate appropriated funds and, therefore, such Regulations cannot apply.

The above ruling of the Court of Claims conflicts in principle with decisions of at least two circuit courts of appeals. The United States Courts of Appeals for the Eighth and Tenth Circuits have recently recognized in decisions (this Court has refused to grant writs of certiorari) that the construction of Capehart housing is financed by private funds and is significantly different from ordinary Government construction. In those cases it was held that the Miller Act (40 U.S.C. secs. 270a-e (1958)) did not apply to the construction of Capehart housing. *Continental Casualty Co.* v. *United States ex rel. Robertson Lumber Co.*, 305 F. 2d 794, 797-99 (8th Cir.), *cert. denied*, 371 U.S. 922 (1962); *United States ex rel. Miles Lumber Co.* v. *Hir-*

rison Grimshaw Constr. Co., 305 F. 2d 363 (10th Cir.), *cert. denied*, 374 U.S. 920 (1962). In both cases, the circuit courts emphasized Capehart housing is not conventional Government construction (nor a "public work") because of the absence of federal funds. The determining factor in finding inapplicability of the Miller Act (which applies to all public works) was the fact that the project was built by a private corporate entity with private capital.

Thus, the decision below in holding that Section VIII applies to this Capehart housing contract conflicts with decisions of this Court and at least two circuit courts of appeals. This Court should resolve such conflicts.

6. Until the Decision Below Was Rendered, the Courts Uniformly Have Held That a Subcontractor Was Entitled to Common-Law Damages Against the Prime for the Unlawful Termination of the Subcontract

In the decision below the Court of Claims very cursorily determined that profit should be allowed on the claims of subcontractors on the same basis as on petitioner's claim.

ASPR recognizes that a prime contractor may be required to pay common-law damages to a subcontractor for the termination of a subcontract (ASPR 8.518.8(a)). Furthermore, there is no requirement in ASPR that a particular convenience termination article be inserted in a subcontract. Section 8.706 of ASPR merely "suggests" a form of such article for use in military fixed-price subcontracts. That language is radically different from the directive language of section 8.703 with regard to the termination article to be inserted in certain prime contracts.

It has been uniformly held that there is no privity of contract between the Government and a subcon-

tractor and that the subcontractor must look entirely to the prime contractor for any compensation due to it with regard to the subcontract. *E.g., Nickel* v. *Pollia*, 179 F. 2d 160 (10th Cir. 1950).

The Court of Claims was asked by petitioner to determine what damages it was obligated to pay the subcontractors for the termination of their subcontracts so that it might recover those damages as part of its costs of termination against the Government. Clearly, ASPR does not apply to the legal relationship between the prime and the subcontractor in the absence of a specific statutory or contract provision to that effect. Furthermore, there is no provision in ASPR that justifies the decision below in this regard.

By depriving the subcontractors of their common-law damages against petitioner under the facts of this case, the decision below has completely changed the position of the subcontractor in the military procurement program from what it always has been. Not only is the prime contractor's contract with the Government no longer a solemn document, but a small subcontractor many tiers removed from privity with the Government is now denied any confidence in just what constitutes his contract. The decision below places the contractual obligations of subcontractors in complete chaos. Yet, subcontractors perform by far the greater part of this country's annual fifty billion dollar military program.

Here, again, the decision below has created confusion, uncertainty, and instability in the critical military procurement program by holding contrary to all precedents with regard to the legal position of subcontractors who have such a vital role in our defense program. The situation can only be remedied by this Court granting certiorari in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A—Opinion, Findings of Fact and Conclusion of Law of the Court Below and Opinion on Motion for Rehearing

Appendix B—Pertinent Provisions of Statutes and Regulations Involved

Appendix C—Legislative History, Published Commentary and Excerpts from Government Publications

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 56-59

(Decided January 11, 1963)

G. L. CHRISTIAN AND ASSOCIATES v. THE UNITED STATES

Norman R. Crozier, Jr., William L. Hilliker, William W. Sweet, Jr., and *Chester E. Finn* for the plaintiffs. *Richard C. Baxter* was on the briefs.

Carl Eardley, with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for the defendant. *Kendall M. Barnes* was on the brief.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:[1]

This case, which involves claims totaling $5,156,144.50,[2] grew out of the deactivation of Fort Polk, Louisiana, by the Department of the Army in 1958. At the time when the decision to deactivate Fort Polk was made, a large housing project, which was to consist of 2,000 dwelling units for the

[1] This opinion borrows heavily from the careful opinion submitted by Commissioner Mastin G. White to the court, though we reach certain major conclusions different from his.

[2] The claims set out in the first amended petition aggregated $5,615,450.90, but adjustments were made in the claims at the time of the trial.

use of military personnel at Fort Polk, was being constructed under a contract that had previously been made by the Corps of Engineers pursuant to the provisions of the Capehart Act.[3] The housing contract was terminated by the Corps of Engineers on February 5, 1958, after which numerous claims for damages were submitted to the Government. Most of the claims (from a numerical standpoint) were settled administratively; and the claims asserted in the present litigation remain for disposition because the particular claimants and the administrative agency could not agree on the amounts due the claimants. This suit therefore involves only the residue of the claims.

I

An unusual feature of the case is that the financial interests of the plaintiff, a joint venture consisting of eight individuals operating under the name of G. L. Christian and Associates, were not affected in any way by the termination of the Fort Polk housing contract. In order to explain this anomalous situation, the events that transpired in connection with the making of the contract will be summarized in some detail.

Pursuant to an invitation for bids issued by the District Engineer in charge of the Galveston District of the Corps

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[3] This is the name commonly used to designate the provisions of law contained in (1) Title VIII of the National Housing Act, as amended and re-enacted by Section 401 of the Housing Amendments of 1955 (69 Stat. 635, 646-651) and as further amended by Sections 501-506(a) of the Housing Act of 1956 (70 Stat. 1091, 1109-1110); (2) Sections 403-409 of the Housing Amendments of 1955 (69 Stat. at pp. 651-654), as amended by Sections 506(b)-509 and 511-512 of the Housing Act of 1956 (70 Stat. at pp. 1110-1112); and (3) Section 410 of the Housing Amendments of 1955, as added by Section 510 of the Housing Act of 1956 (70 Stat. at p. 1110).

of Engineers, the plaintiff, on November 16, 1956, submitted a bid on the construction of the Fort Polk housing project under the Capehart Act. The plaintiff's bid consisted of a basic bid plus certain added items. The District Engineer determined that the plaintiff was qualified by experience and financial responsibility to construct housing under the Capehart Act, and that its bid was the lowest acceptable bid submitted in response to the invitation. The plaintiff's bid was thereupon accepted by the District Engineer in his capacity as contracting officer for the Government. The acceptance was in the form of a "letter of acceptability" dated December 17, 1956.

After its bid for the construction of the Fort Polk housing project was accepted, the plaintiff approached the H. B. Zachry Company in about January 1957 and endeavored to interest that company in forming a joint venture with the plaintiff to construct the project. Zachry was not interested in forming a joint venture with the plaintiff, and so informed it. However, Zachry did indicate a possible interest in obtaining an assignment of the Fort Polk housing project from the plaintiff and handling the job in its entirety. After further discussion, the plaintiff granted Zachry an option to acquire the plaintiff's entire interest in the Fort Polk project for $250,000.

Following these negotiations between the plaintiff and Zachry, the latter approached the Centex Construction Company, Inc., in about February 1957, and proposed that Centex enter into a joint venture with Zachry for the construction of the Fort Polk project. Both Zachry and Centex, which were highly competent construction companies with extensive experience in large-scale enterprises, made estimates regarding the prospective cost of constructing the project and the probable margin of profit in the job, under the price fixed in the plaintiff's bid and in the letter of acceptability. Upon the basis of these calculations, Zachry,

and Centex concluded that the project was feasible and potentially profitable. Consequently, they decided to take over the Fort Polk housing job from the plaintiff and construct the project as a joint venture.

In furtherance of the decision made by Zachry and Centex, Zachry exercised its option to acquire the Fort Polk project from the plaintiff for $250,000. A document on this matter was signed by Zachry and the plaintiff on March 14, 1957. This document provided that the consideration of $250,000 was to be paid by Zachry to the plaintiff as follows: $100,000 was to be paid "in cash upon approval by the proper governmental agencies of this assignment," an additional $75,000 was to be paid within 9 months, and the final installment of $75,000 was to be paid within 18 months. The document declared that, on the basis of such consideration, "Assignors [the plaintiff] hereby assign, transfer, set over and deliver unto H. B. Zachry Company all of their respective rights, titles and interest held or claimed by Assignors or either of them in and to" the Fort Polk housing job.

A written agreement for the construction of the Fort Polk housing project as a joint venture was entered into by Zachry and Centex on April 9, 1957. This agreement provided (among other things) that Centex would be the managing member of the joint venture and would be in charge of the construction of the project; that such funds as might be required by the joint venture for construction would be advanced in the proportions of one-third by Zachry and two-thirds by Centex; and that the profits (or losses) resulting from construction would be shared by the joint venturers in the proportions of one-third to Zachry and two-thirds to Centex.[1]

[1] This joint venture will usually be referred to as "Centex Zachry."

Information regarding the existence of the agreements between the plaintiff and Zachry and between Zachry and Centex was furnished to the District Engineer by the attorney for Centex-Zachry at a conference in Galveston. The District Engineer orally expressed approval of the plan for the takeover of the Fort Polk housing job by Centex-Zachry from the plaintiff. It was agreed at the conference that the takeover would be accomplished by means of a formal assignment of the Fort Polk housing contract (when made) from the plaintiff to Centex-Zachry. Subsequently, however, higher authority in the Department of the Army took the position that a housing contract under the Capehart Act could not be assigned.[5] Thereupon, another conference was held in Galveston between the attorney for Centex-Zachry and the District Engineer. At this conference, it was agreed (subject to the approval of higher authority in the Department of the Army) that the transfer of the Fort Polk housing job to Centex-Zachry would be accomplished by means of a subcontract from the plaintiff to Centex-Zachry that would cover the entire job.

After the approval of higher authority in the Department of the Army was obtained with respect to the plan for the transfer of the Fort Polk housing work from the plaintiff to Centex-Zachry by means of a subcontract covering the entire project, a document entitled "Agreement to Sub-Contract with Irrevocable Power of Attorney Attached" was entered into between the plaintiff and Centex-Zachry on June 27, 1957. The agreement stated that the plaintiff relinquished "all its right, title and interest in and to the proposed contract" for the construction of the Fort Polk housing project; that Centex-Zachry "hereby assumes all of the rights and obligations of G. L. Christian and

[5] This apparently was based upon the first paragraph of Section 3737 of the Revised Statutes, as amended (41 U.S.C. 15).

Associates under the Letter of Acceptability * * * and the proposed contract, and further agrees to relieve and save harmless the said G. L. Christian and Associates from its obligations and responsibilities set forth in said Letter of Acceptability * * * and in the proposed contract"; and that Centex-Zachry "hereby covenant and agree to at all times save harmless and keep indemnified the said G. L. Christian & Associates * * * against any and all claims, suits, actions, debts, damages, costs, charges, and expenses, * * *—and against all liability, losses and damages of every nature whatsoever which G. L. Christian & Associates * * * shall or may at any time sustain or be put to by reason of the aforementioned letter of acceptability, * * * the proposed housing contract * * *, the Power of Attorney * * * made a part hereof, and by the execution of this agreement."

The power of attorney attached to and made a part of this "Agreement to Sub-Contract" irrevocably constituted and appointed Centex-Zachry as the plaintiff's "true and lawful attorney * * * to do any and every act and execute any and every power that Principal * * * might or could do or exercise" in connection with the construction of the Fort Polk housing project, including the authority "to make application for and receive all sums of money due or to become due." The instrument further stated that the plaintiff "hereby represents and agrees that said attorney in fact shall own and be entitled to all moneys and funds payable * * * under said Housing Contract, granting to said attorney in fact authority to collect said funds and to endorse all checks, bills or instruments in connection therewith."

The plaintiff made a profit of $171,516.68 in disposing of the Fort Polk housing job to Centex-Zachry for $250,000, and did not have anything further to do with that project. When a formal contract to cover the construction of the Fort Polk housing project was prepared and signed on

July 29, 1957, the plaintiff's name was used as one of the parties to the contract, but the contract was signed on behalf of the plaintiff by Centex-Zachry. Thereafter, Centex (acting for Centex-Zachry) assumed the role of de facto prime contractor, negotiated with the persons interested in furnishing supplies, materials, or services in connection with the performance of the work under the contract, entered into numerous subcontracts, and began the construction of the project. None of these activities involved any expense to the plaintiff, and no claim is asserted against the Government in the present litigation on account of any losses allegedly sustained by the plaintiff in the form of unreimbursed expenses or anticipated profits.

The losses on which the present litigation is based were allegedly sustained by Centex-Zachry, the plaintiff's nominal subcontractor, and by certain of Centex-Zachry's subcontractors. These claimants are maintaining the present action in the name of the plaintiff, the nominal prime contractor, because they, having no privity of contract with the Government, cannot sue the Government in their own names. *Severin* v. *United States*, 99 Ct. Cl. 435, 442 (1943), *cert. denied*, 322 U.S. 733 (1944).

Generally, when a prime contractor's action against the Government is based on losses allegedly sustained by subcontractors, the possibility of recovery depends not only upon proof that the subcontractors actually sustained the alleged losses, but also upon proof that the prime contractor is liable to the subcontractors for the damages sustained by the latter. *Continental Illinois National Bank* v. *United States*, 121 Ct. Cl. 203, 244-245, 101 F. Supp. 755, 758 (1952), *cert. denied*, 343 U.S. 963; *J. L. Simmons Company, Inc.* v. *United States*, Ct. Cl. No. 186-59, decided July 18, 1962, slip op. pp. 4-5, 304 F. 2d 886, 888-89. In the present case, the plaintiff is not under any liability to its nominal subcontractor, Centex-Zachry, or to the latter's subcontractors

because of any losses which these claimants sustained when the Fort Polk housing contract was terminated by the Government. The plaintiff is insulated from such liability by the provision in the "Agreement to Sub-Contract", dated June 27, 1957, to the effect that Centex-Zachry will "at all times save harmless and keep indemnified the said G. L. Christian & Associates * * * against any and all claims, suits, actions, debts, damages, costs, charges and expenses, * * * and against all liability, losses and damages of every nature whatsoever" arising in connection with the Fort Polk housing contract.

However, the Government, though mentioning the point, has not stressed the "*Severin* doctrine", and we do not believe that it applies in these circumstances. With the Government's full knowledge and assent, Centex-Zachry became in actual fact the prime contractor; it signed the contract with the Government on behalf of the plaintiff and took over the entire role of prime contractor, including the management of performance in the six months prior to the cancellation; the defendant has settled with it a large part of the claims and has paid its subcontractors through it. For the purposes of the "*Severin* doctrine", the only fair position in this court is to treat Centex-Zachry as the prime contractor, to which the housing contract has been assigned with the defendant's full consent, and to disregard the nominal plaintiff as if it were no longer involved.

The question remains whether the Anti-Assignment Act absolutely precludes us from recognizing Centex-Zachry as the true party in interest. That statute (R.S. 3737, 41 U.S.C. 15) speaks imperatively of annulling any Government contract which is transferred, but it has nevertheless been interpreted as being solely for the Government's own benefit and therefore as permitting the Government to assent to and recognize an assignment where it seems appro-

priate. *Maffia* v. *United States*, 143 Ct. Cl. 198, 203, 163 F. Supp. 859, 862 (1958); *Thompson* v. *Commissioner*, 205 F. 2d 73, 78 (C.A. 3, 1953); *The Federal Mfg. and Printing Co.* v. *United States*, 41 Ct. Cl. 318, 321 (1906); 16 Op. Atty. Gen. 277 (1879); 15 Op. Atty. Gen. 235, 245-6 (1877); 5 Op. Atty. Gen. 738 (1821); but cf. 19 Op. Atty. Gen. 186 (1888). That was certainly done here. Before and during performance of the contract and after its termination, the Government recognized Centex-Zachry as the prime contractor and consented to its full participation in that capacity. It would be unreasonable for us to hold otherwise at this late stage.

II

The Government concedes that the claimants are entitled to be made financially whole, at least with respect to all reasonable expenses that they incurred in preparing to perform work under the Fort Polk housing contract, in partially performing that contract from August 1957 to January 1958, and in meeting the situation that arose when the contract was formally terminated by the Government early in February 1958. The controversy revolves around the proper amounts of the claimants' unreimbursed expenses and the legal question whether the claimants are entitled to recover for anticipated profits. At the time work was suspended in January 1958, the project was only 2.036% complete and the work was substantially behind schedule.[6]

The principal legal question is whether the claimants should be permitted to recover for anticipated profits. In this connection, it is settled that, when the Government enters into a contract, it has rights and it ordinarily incurs

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[6] The project was supposed to be completed in about 18 months after its commencement in August 1957. The total contract price was $32,893,100.

responsibilities similar to those of a private person who is a party to a contract (*Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *Perry* v. *United States*, 294 U.S. 330, 352 (1935)), and if the Government terminates a contract without justification, such termination is a breach of the contract and the Government becomes liable for all the damages resulting from the wrongful act (*United States* v. *Behan*, 110 U.S. 338, 346 (1884); *United States* v. *Spearin*, 248 U.S. 132, 138 (1918)). The damages will include not only the injured party's expenditures and losses in partially performing the contract, but also, if properly proved, the profits that such party would have realized if he had been permitted to complete the contract. *Broadbent Laundry Corp.* v. *United States*, 56 Ct. Cl. 128, 132 (1921); see *United States* v. *Behan*, *supra*, at p. 344. The objective is to put the injured party in as good a position pecuniarily as he would have been in if the contract had been completely performed. *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924); *Needles* v. *United States*, 101 Ct. Cl. 535, 619 (1944).

The right to recover for anticipated profits arises, however, only if the termination of the contract by the Government is wrongful and constitutes a breach. If the Government has reserved the right to terminate a contract for its convenience and then does so, there is no breach and normally there can be no recovery for the profits that would have been made if the Government had not exercised its reserved right. *Davis Sewing Machine Co.* v. *United States*, 60 Ct. Cl. 201, 217 (1925), affirmed 273 U.S. 324 (1927); *College Point Boat Corp.* v. *United States*, 267 U.S. 12 (1925); *De Laval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 73 (1931).

In the present case, although the Fort Polk housing contract did not contain any provision expressly authorizing the Government to terminate the contract for its convenience, the Government contends that the contract should be

read as if it did contain such a clause. This argument is largely based upon Section 8.703 of the Armed Services Procurement Regulations.[7] Section 8.703 provided (with an exception which is not pertinent here) that "the following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000," and then proceeded to prescribe a detailed termination clause that began with the unequivocal declaration that "the performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government," and included a formula which did not encompass anticipated profits. As the Armed Services Procurement Regulations were issued under statutory authority,[8] those regulations, including Section 8.703, had the force and effect of law. See *Williams v. Commissioner of Internal Revenue*, 44 F. 2d 467, 468 (C.A. 8, 1930); *Ex parte Sackett*, 74 F. 2d 922-23 (C.A. 9, 1935). If they applied here, there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did. *College Point Boat Corp. v. United States, supra; De Laval Steam Turbine Co. v. United States, supra; Monolith Portland Midwest Co. v. R.F.C.*, 178 F. 2d 854, 858 (C.A. 9, 1949), *cert. denied*, 339 U.S. 932 (1950).

The question of whether the regulations did govern the present contract depends upon Section 1.102 which limited

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[7] At the time with which we are concerned, the Armed Services Procurement Regulations comprised Subchapter A of Chapter I of Title 32, CFR (Rev. 1954).

[8] The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C., § 151, *et seq.* (1952 ed.), was the principal statute relied upon in issuing the regulations.

their applicability to "purchases and contracts made by the Department of Defense * * * for the procurement of supplies or services *which obligate appropriated funds* * * *" (emphasis added). Plaintiff contends that the Fort Polk housing contract did not "obligate appropriated funds." It points out that the construction of housing projects at military installations under the Capehart Act was financed by means of loans from private lending institutions, and the contractors and subcontractors doing the construction work were paid out of the proceeds of such loans. In this case, the money for the construction of the Fort Polk housing project was loaned by the Republic National Bank of Dallas, and the progress payments to Ceatex-Zachry and its subcontractors during the partial construction of the project were derived from the loans made by the Republic National Bank of Dallas.[9]

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[9] The steps in a Capehart Act project are as follows: After deciding that a housing project should be built at or in connection with a post on government-owned property, the Army (for example) would have preliminary plans prepared, secure a preliminary approval from F.H.A., and then issue an invitation for bids. A "letter of acceptability" would be issued to the lowest acceptable bidder (see findings ¶ 13), requiring it, *inter alia*, to organize one or more mortgagor-builders which would lease the underlying land from the Government and make arrangements with a financial institution to finance the project with a 100% mortgage. As construction proceeds, the mortgagor-builders draw money from the bank and pay the contractor. When the project is completed, the contractor will have received its full bid price and the mortgagor-builders will own the project, subject to a 100% mortgage to the financial institution which is the mortgagee. The stock of the mortgagor-builders, previously placed in escrow, will then be transferred to the Army. Thereafter, moneys appropriated to pay the housing allowances of personnel assigned quarters in the project buildings are used to service the mortgage. The Government, as owner of the mortgagor-builders, is liable for the outstanding indebtedness and maintains and operates the housing.

On the other hand, the Government insists that it was anticipated that the cost of constructing the Fort Polk housing project would ultimately be liquidated out of appropriated funds, because it was expected that the housing project would be completed, that the dwelling units would be occupied by military personnel assigned to Fort Polk, and that the quarters allowances of such military personnel (provided for in the annual appropriations to the Department of the Army) would be used to pay off, over a period of years, the loans made by the Republic National Bank of Dallas. Also, the loans made by the bank for the construction of the Fort Polk housing project were insured by the Federal Housing Administration, and from the beginning there was at least a possibility that the F.H.A. might be compelled to make good on its commitments to the bank. As indicated in footnote 9, *supra*, on completion of the project or on termination of the contract, the Government specifically undertook (in the contract with plaintiff and accompanying agreements) to take over ownership of the mortgagor-corporations, to assume liability to the mortgagee for sums advanced, and pay the outstanding notes. Moreover, Centex-Zachry and its subcontractors have looked to the Government for settlement and payment of their claims, and have received very large amounts of appropriated funds in the partial settlements which have already been accomplished.

Despite the unusual character of the contract, we have little difficulty in reading the Procurement Regulations, especially the rule requiring the insertion of the standard termination clause, as applying to the present type of agreement which could and would obligate appropriated funds, ultimately if not immediately. As we see it, the primary aim of the exclusion of agreements which do not obligate appropriated funds is to put to one side the contracts of the conventional non-appropriated-fund instru-

mentalities of the armed forces, such as post exchanges, ships' stores, officers' clubs, and the like. The contracts of such agencies, although made by Government officers, do not bind appropriated funds, do not create a debt of the United States, and may not be vindicated in this court. *Borden v. United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Co. v. United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); cf. *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 485 (1942). Those are the contracts which the Procurement Regulations declare are to be governed by their own separate rules. But the Regulations do not intimate that contracts which obligate the United States, and create a debt of the United States upon which suit is and can be brought, are also excluded simply because the use or obligation of appropriated funds is delayed and to some extent contingent. There is no doubt that the contract in this case bound the United States and that appropriated funds are importantly involved. The contractor and subcontractors did not hesitate to consider the United States, which of course pays through appropriated funds, liable for the cancellation of the contract. Large sums of appropriated monies were accepted after administrative settlement, and suit is now brought in a court whose judgments are payable through appropriated funds. It would be extraordinary, we think, if an agreement for the breach of which the United States must pay through appropriations was not deemed to obligate such funds.

The Congressional authorization for the contract, *i.e.*, the Capehart Act itself, recognizes affirmatively that appropriated funds will be involved. One section authorized "to be appropriated such sums as may be necessary to provide for payment to meet losses from such guaranty" given by the Defense Department to the Armed Services Housing

Mortgage Insurance Fund (12 U.S.C. 1748(b)(2) (1958 ed.)).

Another provision permits the military departments to use "appropriations for quarters allowances or appropriate allotments" for the payment of principal, interest, and other obligations of mortgagor corporations acquired by the Government (42 U.S.C. 1594b (1958 ed.)) (see footnote 9, *supra*). The Congress which passed the Capehart Act understood that in the long run the housing contracts thereunder could and would "obligate appropriated funds."

We are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy. Regularly since World War I, it has been a matter of government principle, in times of stress or increased military procurement, to provide for the cancellation of defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work—but not to allow anticipated profits. In World War I, there was the Act of June 15, 1917, 40 Stat. 182, and the Deaf Act of 1919, 40 Stat. 1272, both of which were held to prevent awards of prospective or possible profits. *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 523-24 (1923); *Barrett Co.* v. *United States*, 273 U.S. 227, 235 (1927); *De Laval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 73 (1931). In World War II, the termination provisions used by the war contracting agencies (at least since late 1941) uniformly disallowed anticipated profits. See the opinion of Mr. Justice Douglas in *United States* v. *Penn Foundry &*

Mfg. Co., 337 U.S. 198, 214-216 (1949), also 337 U.S. at 205-06; Office of Contract Settlement, *A History of War Contract Termination and Settlements* (July 1947), pp. 1, 27. The same policy against unearned profits was embodied in the Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649), Section 6(d)(5) of which directed war contracting agencies, in settling terminated contracts, to award "such allowance for profit on the preparations made and "work done for terminated portions of the war contract as is reasonable under the circumstances"; the regulation issued by the Office of Contract Settlement specifically limited profit to preparations made and work done (32 C.F.R., 1944 Supp., Sec. 8006.5(c), p. 3065). Similarly, the Lucas Act of August 7, 1946, 60 Stat. 902, authorizing the departments and agencies "to consider, adjust, and settle equitable claims of contractors," limited the amount of the claim to "losses (not including diminution of anticipated profits) incurred * * *." Since World War II, the standard termination clauses promulgated by the Defense Department and its constituent agencies have taken the same tack. Literally thousands of defense contracts and subcontracts have been settled on that basis in the past decades.

This history shows, in our view, that the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur. Particularly in the field of military housing, tied as it is to changes and uncertainties in installations,[10] would it be necessary to take account of a possible termination in advance of completion, and to guard against

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[10] See *Henry Barracks Housing Corp. v. United States*, Ct. Cl. No. 524-58, decided July 15, 1960, slip op., pp. 7-8, 281 F. 2d 196, 201-02.

a common law measure of recovery which had been disallowed for so many years in military procurement. The experienced contractor in this case, for its part, could not have been wholly unaware that there might be a termination for the convenience of the Government, which the defendant would not deem a breach. Although the housing contract does not contain such an express provision, there are at least four references in it (and the accompanying agreements) to a "termination of the Housing Contract for the convenience of the Government" and to the Government's assumption of certain obligations in that event. These references must have had some meaning. For many years unearned profits have not been paid upon such terminations, and we think it probable, too, that Centex-Zachry knew of that general policy.

For all of these reasons, we believe that it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law.

It follows that Centex-Zachry and its subcontractors cannot recover unearned but anticipated profits. Under the standard termination clause (see finding 31(6)), which we hold governs this case, the contractor is entitled to the cost of the work performed and the cost of settling subcontract claims—plus 2% of the cost of materials and articles delivered to the site but not incorporated in the work and 8% of the balance of the cost (with the total profit not to exceed 6% of the whole cost of the work), unless the contractor would have sustained a loss on the entire contract in which event no profit is to be allowed. This is the guide for ascertaining Centex-Zachry's profit. Profit for the subcontractors should be allowed on the same basis.

Since the parties did not apply the termination article in their administrative settlements and the case was not tried

in this court on that principle, it may be impossible or overly difficult at this stage to comply precisely with all the terms of the article or fully to accord with the general practice which has grown up under it. But we believe the article should be applied as nearly as it can reasonably be to the determination of allowable profit and with greater leeway, if necessary, to the other problems which may arise. We leave to the Commissioner, under Rule 38(c), the actual determination of the amounts still owing (if any), under these standards, to Centex-Zachry and the subcontractors for earned profit. For the guidance of the parties and the Commissioner, we add simply that we are not impressed with the defendant's faint suggestion that Centex-Zachry would have suffered a loss on the entire contract and that some of the subcontractors would have been in the same position.

III

There are a few items of cost, actually incurred, as to which the parties still disagree. With respect to Centex-Zachry, the Government disputes the allowance of the full $250,000 payment made by Centex-Zachry to the plaintiff, pointing out that $171,517 of that amount represents profit to the plaintiff and only $78,483 represents the costs of performance by plaintiff before it assigned the contract (see finding 46). The Commissioner took account of this $171,517 profit by allowing it as a cost to Centex-Zachry but deducting it in computing the latter's contemplated profit. In view of our disallowance of anticipated profits, we believe it preferable to include only the sum of $78,483, reflecting an actual cost to performance, in the contractor's costs. The defendant also attacks the allowance of $58,484 in legal fees, but we see no reason to disturb the Commissioner's finding that this was a reasonable allowance. We have also examined the few exceptions to the findings relating to the costs of the subcontractors of Centex-Zachry,

but have not been persuaded that the Commissioner was wrong.

On costs (leaving aside profit under the termination clause) the result is that we find that Centex-Zachry has received $34,630 more than its incurred costs; and that, of the subcontractors, Air-Way Corporation is entitled to $1,270 for unreimbursed costs, Kitzman's joint venture is entitled to $13,512.72 but owes the defendant $65,915.83 for plumbing materials, Mid West Contracting Company is entitled to $2,500, and Witte Gravel Company has been paid for all its costs.

Plaintiff is entitled to recover, on behalf of Centex-Zachry and the subcontractors, in accordance with and to the extent indicated in this opinion. The amount of the recovery, if any, on behalf of Centex-Zachry and the subcontractors will be determined pursuant to Rule 38(c).

DURFEE, *Judge*; LARAMORE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and arguments of counsel, makes findings of fact as follows:

1. (a) The nominal plaintiff in this case is a joint venture, which operates under the name of G. L. Christian and Associates and which is composed of the following individuals: G. L. Christian, H. A. Crabb, F. A. Hunter, O. Gerrard, Jr., A. J. Whipple, Paul H. Wolf, N. H. Mitchell, and Preston R. Plumb, Sr. (This joint venture will usually be referred to in subsequent findings as "the plaintiff.")

(b) The real claimants in the case are:

(1) Centex Construction Company, Inc., and H. B. Zachry Company, a joint venture, both companies being

corporations organized under the laws of the State of Delaware.

(2) Air-Way Corporation, a corporation organized under the laws of the State of Ohio.

(3) Kitzman's Plumbing & Heating, Inc., Kitzman's, Inc., Kitzman's of Florida, Inc., and Kitzman's Plumbing of Louisiana, Inc., a joint venture, the first two companies being corporations organized under the laws of the State of California, the third being a Florida corporation, and the fourth being a Louisiana corporation.

(4) Mid West Contracting Company, a proprietorship owned by B. F. Schoeneman.

(5) Witte Gravel Company, a corporation.

2. Pursuant to an invitation for bids (No. ENG-41-243-57-8) which had previously been issued by the District Engineer in charge of the Galveston District, Corps of Engineers, United States Army, the plaintiff on November 16, 1956, submitted to the District Engineer at Galveston, Texas, a bid for the construction under the Capehart Act of a housing project that was to consist of 2,000 dwelling units for the use of military personnel at Fort Polk, Louisiana. The plaintiff's bid consisted of a basic bid plus certain additive items.

3. It having been determined by the District Engineer that the plaintiff was qualified by experience and financial responsibility to construct housing under the Capehart Act and that the plaintiff's bid was the lowest acceptable bid submitted in response to the invitation mentioned in finding 2, the plaintiff's bid was accepted by the District Engineer, acting for the defendant. The acceptance was in the form of a letter of acceptability dated December 17, 1956.

4. The plaintiff proposed to construct the Fort Polk housing project of 2,000 dwelling units as a single mortgage area. To that end, the plaintiff, shortly after its bid for the construction of the project was accepted on December 17, 1956, caused a mortgagor-builder corporation, known as the Fort Polk Housing Corporation, to be organized under the laws of the State of Delaware with a paid-in capital stock of $1,000, made arrangements with a mortgagee-lender acceptable to the Federal Housing Commissioner for the financing of the construction of the project, caused the mortgagee-lender to make application to the Federal Housing Administration for FHA insurance in connection with the project, and took other preliminary steps preparatory to the ultimate construction of the project.

5. The plaintiff, in about January 1957, approached the H. B Zachry Company, a Delaware corporation doing business in the States of Texas and Louisiana, and endeavored to interest that company in joining with the plaintiff in a joint venture to construct the Fort Polk housing project. The H. B. Zachry Company was and is a highly competent construction company, with extensive experience in large-scale enterprises. (For the sake of convenience, the H. B. Zachry Company will usually be referred to hereafter in the findings as "Zachry.") Zachry was not interested in forming a joint venture with the plaintiff, and so informed the plaintiff. However, Zachry did indicate a possible interest in obtaining an assignment of the Fort Polk housing job from the plaintiff and handling the job in its entirety. After further discussion, the plaintiff granted to Zachry an option to acquire the plaintiff's entire interest in the Fort Polk housing job for $250,000.

6. After Zachry had obtained from the plaintiff the option referred to in finding 5, Zachry, in about February 1957, approached the Centex Construction Company, Inc.,

a Delaware corporation doing business in the States of Texas and Louisiana, and proposed that the latter company enter into a joint venture with Zachry for the construction of the Fort Polk housing project. Like Zachry, the Centex Construction Company, Inc., was and is a highly competent and experienced construction company. (For the sake of convenience, the Centex Construction Company, Inc., will usually be referred to in subsequent findings as "Centex.") Zachry and Centex made estimates regarding the prospective cost of constructing the Fort Polk housing project and the probable margin of profit that existed in the job under the price fixed in the plaintiff's bid and the letter of acceptability. Upon the basis of these calculations, Zachry and Centex concluded that the project was feasible and potentially profitable. Consequently, they decided to take over the Fort Polk housing job from the plaintiff, and to construct the project as a joint venture.

7. (a) Zachry exercised the option referred to in finding 5 and entered into an agreement with the plaintiff under the date of March 14, 1957, for the acquisition of the plaintiff's interest in the Fort Polk Housing job.

(b) The agreement of March 14, 1957, between the plaintiff and Zachry provided in part as follows:

> NOW, THEREFORE, in consideration of the premises and the consideration hereinbelow set out, Assignors [the plaintiff] hereby assign, transfer, set over and deliver unto H. B. Zachry Company all of their respective rights, titles and interest held or claimed by Assignors or either of them in and to the Fort Polk, Leesville, Louisiana, FHA No. 059-81003, Army No. 2, Project, described in letter of acceptability dated December 17, 1956, and letter extending the date for compliance therewith dated February 27, 1957, signed by W. P. McCrone, Colonel, CE, District Engineer, Corps of Engineers, United States Army, Galveston District, Galveston, Texas, including, but not limited

thereto, all contracts issued or to be issued in connection therewith, and granting unto H. B. Zachry Company full and complete rights of subrogation in the premises.

* * * * * *

Upon the execution and delivery of this assignment to H. B. Zachry Company, and the approval thereof by the proper governmental agency, H. B. Zachry Company agrees to pay Assignors the aggregate sum of $250,000 at the times and in the following manner:

(a) $100,000 in cash upon approval by the proper governmental agencies of this assignment; and

(b) $150,000 in the form of a negotiable promissory note payable to the order of F. A. Hunter, Partner, in two installments, the first becoming due and payable on or before nine months from date of this assignment, in the amount of $75,000, and the remaining installment to be due and payable on or before eighteen months from said date; said note to bear interest at the rate of 4½ per cent per annum payable on the same dates as the installments of principal are due and payable.

H. B. Zachry Company agrees to reimburse Assignors the $25,000 deposited by Assignors with the submission of their bid for said project, together with the sum of $50,000 heretofore deposited by Assignors with the Federal Housing Administration District Office, Shreveport, Louisiana, as the processing fee in connection with the application for FHA mortgage insurance." * * *

8. A formal agreement for the construction of the Fort Polk housing project as a joint venture was entered into between Zachry and Centex under the date of April 9, 1957. This agreement provided (among other things) that Centex would be the managing member of the joint venture and would be in charge of the construction of the Fort Polk housing project; that such funds as might be required by the joint venture for the construction of the project would be advanced in the proportions of one-third by Zachry

and two-thirds by Centex; that the profits (or losses) resulting from the construction of the project would be shared by the joint venturers in the proportions of one-third to Zachry and two-thirds to Centex; and that neither Zachry nor Centex would make any charges against the joint venture for ordinary overhead expenses or for time which might be expended by officers or employees of the respective companies in connection with the construction of the project, other than the officers and employees actually working on the project, but that Centex would be entitled to receive the amount of $50,000 to reimburse it "for all home office administrative work and salaries of home office personnel in connection with the construction of this project." (This joint venture will usually be referred to in subsequent findings as "Centex-Zachry.")

9. At the time when the Centex-Zachry joint venture agreement of April 9, 1957, was entered into, Norman R. Crozier, Jr., was employed to represent Centex-Zachry as attorney in connection with legal matters pertaining to the construction of the Fort Polk housing project.

10. Information regarding the existence of the agreements between the plaintiff and Zachry and between Zachry and Centex was furnished to the District Engineer by the attorney for Centex-Zachry at a conference in Galveston. The District Engineer orally expressed approval of the plan for the takeover of the Fort Polk housing job by Centex-Zachry from the plaintiff. It was orally agreed at the conference that the takeover would be accomplished by means of a formal assignment of the Fort Polk housing contract (when made) from the plaintiff to Centex-Zachry. Subsequently, however, higher authority in the Department of the Army took the position that a housing contract under the Capehart Act could not be assigned. Thereupon, another conference was held in Galveston between the attorney for Centex-Zachry and the District Engineer. At

this conference, it was agreed (subject to the approval of higher authority in the Department of the Army) that the takeover of the Fort Polk housing job by Centex-Zachry would be accomplished by means of a subcontract from the plaintiff to Centex-Zachry, which subcontract would cover the entire job.

11. (a) After the approval of higher authority in the Department of the Army had been obtained with respect to the plan for the transfer of the Fort Polk housing job from the plaintiff to Centex-Zachry by means of a subcontract covering the entire job, a document entitled "Agreement to Sub-Contract with Irrevocable Power of Attorney Attached" was entered into between the plaintiff and Centex-Zachry on June 27, 1957.

(b) The agreement mentioned in paragraph (a) of this finding provided in part as follows:

> 1. G. L. Christian and Associates hereby agree to subcontract to Centex Construction Co., Inc., and H. B. Zachry Co., a Joint Venture, as general contractor all of the work provided for and contemplated in the aforesaid Letter of Acceptability * * * for the contract price therein set out, or as may be hereafter changed and relinquishes all its right, title and interest in and to the proposed contract * * * to be known and identified as Contract No. DA-41-243-eng-3361.
>
> 2. Centex Construction Co., Inc. and H. B. Zachry Co., a Joint Venture, accept this sub-contract from G. L. Christian and Associates together with all of the right, title, interest, liabilities and obligations of G. L. Christian and Associates in and to the proposed Contract No. DA-41-243-eng-3361 and hereby assumes all of the rights and obligations of G. L. Christian and Associates under the Letter of Acceptability * * * and the proposed contract, and further agrees to relieve and save harmless the said G. L. Christian and Associates from its obligations and responsibilities set forth in

said Letter of Acceptability * * * and in the proposed contract.

* * * * *

4. As part of the consideration for this agreement to sub-contract the whole of said work to be performed under the said housing contract hereinabove designated to Centex Construction Co., Inc. and H. B. Zachry Co., and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the undersigned, Centex Construction Co., Inc., its successors and assigns, and H. B. Zachry Co., its successors and assigns, jointly and severally, hereby covenant and agree to at all times save harmless and keep indemnified the said G. L. Christian & Associates, and each of said members constituting the joint venture of G. L. Christian & Associates, against any and all claims, suits, actions, debts, damages, costs, charges and expenses, including Court costs and attorney's fees and against all liability, losses and damages of every nature whatsoever which G. L. Christian & Associates, or any of the members of the said joint venture, shall or may at any time sustain or be put to by reason of the aforementioned letter of acceptability, * * * the proposed housing contract No. DA-41-243-eng-3561, the Power of Attorney hereinbefore referred to and made a part hereof, and by the execution of this agreement.

4(c). The "Irrevocable Power of Attorney" which was executed by the plaintiff and attached to the agreement of June 27, 1957, irrevocably constituted and appointed Centex Zachry as the plaintiff's:

> true and lawful attorney * * * to do any and every act and execute any and every power that Principal * * * might or could do or exercise to fully, effectually and finally carry out and comply with all the terms and provisions of that certain instrument entitled "Letter of Acceptability" dated December 17, 1956, * * * and to carry out and comply with the same; to make and enter into a Housing Contract * * * and to carry out and comply with all the terms, provisions and require-

ments thereof, and further to make, enter into, execute and deliver such other contracts, sub-contracts, guaranties, statements, documents and instruments as may be necessary or required to fully and finally complete the said Housing Contract * * *; to make application for and receive all sums of money due or to become due in connection with or on account of the above and foregoing and to collect money, endorse checks * * *, sue, compromise, arbitrate, carry on or consummate any and all other negotiations whatever necessary or proper in connection with said project * * *; and to do and perform all acts that are requisite and necessary in the execution, operation or maintenance of said projects * * *.

The power of attorney further provided in part as follows:

> Principal * * * hereby represents and agrees that said attorney in fact shall own and be entitled to all moneys and funds payable * * * under said Housing Contract, granting to said attorney in fact authority to collect said funds and to endorse all checks, bills or instruments in connection therewith * * *.

12. As indicated in finding 4, it had been the plaintiff's intention under the original letter of acceptability dated December 17, 1956, to construct the entire Fort Polk housing project, which was to consist of 2,000 dwelling units, as a single mortgage area. After Centex-Zachry acquired the job, Centex-Zachry decided that, in order to reduce interest, insurance costs, and amounts withheld during construction, the project would be divided into eight separate mortgage areas. This change was satisfactory to the District Engineer.

13. The District Engineer, acting for the defendant, amended the letter of acceptability and reissued it to the plaintiff (in care of the attorney for Centex-Zachry) under the date of July 3, 1957. The letter of acceptability, as amended, provided as follows:

> 1. Your bid dated 16 November 1956 as modified by new wage rates in the amount of Thirty-two million,

eight-hundred ninety-three thousand, one-hundred dollars ($32,893,100.00), (consisting of the basic bid and additive bid Items Nos. "a", "b", "c", "d", "e", "g", and "j") after deductions or adjustments, if any, hereinafter specified and offering to construct through mortgage financing a housing project consisting of two-thousand (2,000) housing units at Fort Polk, Leesville, Louisiana, (Invitation No. ENG-41-243-57-8) under Title IV of the Housing Amendments of 1955 (Public Law 345, 85th Congress) and Title V of the Housing Act of 1956 (Public Law 1020, 84th Congress, Chapter 1029, 2nd Session) has been determined by the Department of the Army (hereinafter referred to as the "Department"), after consultation with the Federal Housing Commissioner (hereinafter called the "Commissioner"), to be the lowest acceptable bid. Issuance of this amended Letter of Acceptability obligates you, at your own expense, and within the condition of the bid security, to:

a. Complete, in conformity with the requirements of the Federal Housing Commissioner, and your division of the project into eight (8) areas, eight (8) new corporations (hereinafter referred to as the "mortgagor-builder"), in accordance with the laws of the State of Delaware, each corporation with paid-in capital stock of One thousand dollars ($1,000) and cause each mortgagor-builder to hold an immediate election of officers with authority on behalf of the mortgagor-builder to execute with the Department a lease of land from the Department and to execute the Housing Contract hereinafter referred to.

b. Immediately following each incorporation and election of officers, cause the stockholders of each mortgagor-builder to execute a stock transfer and escrow agreement in a form approved by the Commissioner.

c. Complete the necessary arrangements with mortgage lenders acceptable to the Commissioner as mortgagees for financing the cost, including your profit, of said eight (8) housing projects through the execution of mortgages and mortgage notes for a period of

twenty-five (25) years and bearing interest at not greater than four percentum (4%) per annum, with the option of prepayment without penalty at the end of fifteen (15) years; cause each mortgagor-builder and each mortgage lender to enter into a Building Loan Agreement, a specimen form of which is attached to the Invitation for Bids; cause each mortgage lender to apply to the Commissioner for mortgate insurance; and take all steps necessary to cause the Commissioner to issue a Commitment for Insurance on or before 15 July 1957 to provide insurance during and after construction of each of said FHA housing projects, which are numbered as follows:

Area No.	*FHA Project No.*
I	059-81005
II	059-81006
III	059-81007
IV	059-81008
V	059-81009
VI	059-81010
VII	059-81011
VIII	059-81012

d. Cause each mortgagor-builder to execute at U.S. Army Engineer District, Galveston, Texas, a lease, a form of which is attached to the Invitation for Bids, with the appropriate officer of the Department. The contract numbers for these leases are as follows:

Area No.	*Contract Numbers*
I	DA-41-243-Eng-3463
II	DA-41-243-Eng-3464
III	DA-41-243-Eng-3465
IV	DA-41-243-Eng-3466
V	DA-41-243-Eng-3467
VI	DA-41-243-Eng-3468
VII	DA-41-243-Eng-3469
VIII	DA-41-243-Eng-3470

e. Make arrangements for and obtain such title insurance policies or evidence of title, based upon the surveys of each FHA project site, and the description contained in the eight (8) leases mentioned in the preceding sub-paragraph, as may be required by such mortgagees and the Commissioner, or any of them. For this purpose, you may obtain from the Contracting Officer copies of surveys made in connection with the development of each FHA project.

f. Make all necessary arrangements with the Department or otherwise for the utility services required and be prepared at the closing (as defined in your bid) to furnish evidence in the form of written contracts or commitments that there will be made available to you during the construction period at each FHA project site such utility services as will be adequate for construction.

g. Be prepared to pay or cause to be paid prior to or at the closing: (1) to the Commissioner, the Commitment fee, filing fee, processing fee and the premium for mortgage insurance during the construction period, (2) to the Contracting Officer, the cost of the Architect-Engineer services for the design of each FHA project in the following amounts:

Area No.	*Amount*
I	$45,350.00
II	23,815.00
III	41,803.00
IV	38,003.00
V	40,536.00
VI	27,615.00
VII	19,255.00
VIII	16,974.00
	$253,351.00

the inspection fees in the following amounts for each area:

Area No.	*Inspection Fees*
I	$124,350.00
II	65,501.00
III	114,082.00
IV	105,374.00
V	112,880.00
VI	76,670.00
VII	53,192.00
VIII	46,998.00
	$699,047.00

and a sum of One thousand dollars ($1,000) as consideration for each of the eight (8) leases.

h. Be prepared at the closing to furnish all the mortgagor-builders and the mortgagees with assurance of completion (utilizing FHA Form No. 2452-C, "Contract Bond—Dual Obligee"), providing separate penalty amounts for performance and payment of at least fifty percent (50%) of the total amount shown in Article 3 of the Contract, indorsed by a corporate surety acceptable to the Department, the mortgagee and the Commissioner.

i. Execute prior to or at the time of closing the Housing Contract and all other documents required to be executed or delivered by you at such closing.

j. Cause each mortgagor-builder and each mortgagee through their duly authorized representative prior to or at the time of closing to execute all documents required to be executed and delivered by them respectively at the closing.

k. Furnish the Contracting Officer with photostatic copies of each FHA Commitment for Insurance and each FHA Project Analysis as soon as possible after issuance thereof, and two (2) copies of all additional closing papers required by the Commissioner or each mortgagee.

l. Furnish the eight (8) executed Trade Payment Breakdown, FHA Form No. 2536, including the signature thereof of the mortgagor-builder concerned.

m. Make application to the Contracting Officer for an appropriate wage determination for use in construction of the project. A copy of such wage determination, after having been obtained from the Secretary of Labor, shall be furnished to you and the Commissioner. Such wage determination will be used by the Commissioner to increase or decrease the bid price in the manner specified in your bid.

n. Acknowledge in writing receipt of this revised Letter of Acceptability and attach an estimated schedule showing dates upon which you will have accomplished the several steps required above.

2. There are no deductions or adjustments resulting from alternates.

3. Failure to perform all obligations required to be performed prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the entire housing project and for the recovery under your bid security of liquidated damages in the sum of Twenty-five Thousand Dollars ($25,000.00). The decision of the Contracting Officer shall be in writing and shall be final and conclusive unless, within thirty (30) days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph, you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

4. All payments to the Contracting Officer shall be certified or cashier's checks made payable to the Treasurer of the United States, and all payments to the Commissioner shall be by certified or cashier's checks

made payable to the Commissioner of FHA but separate checks shall be made to each, respectively, for each FHA project and each fee as listed.

5. This Letter of Acceptability, as revised, commits the Department to execute eight (8) leases substantially in the form attached to the Invitation for Bids upon compliance by you with the provisions of subparagraph 1a hereof; and to enter into negotiations with you for any utility services to be furnished by the Department during the construction period.

6. You are required to be ready for the closing as early as possible after funds have been provided by Congress to the Federal National Mortgage Association, but not later than 29 July 1957, if funds have been provided to FNMA before that date, provided, that the Contracting Officer may extend the date of closing in writing upon written proof from you that the delay was caused by conditions beyond your control, and any dispute concerning such an extension will be settled in the manner provided for settling disputes under paragraph 3 hereof.

14. Centex (acting for Centex-Zachry) employed a registered professional engineer to survey the site of the Fort Polk housing project and divide it into eight mortgage areas.

15. Seven additional mortgagor-builder corporations (in addition to the Fort Polk Housing Corporation, previously established by the plaintiff) were formed by Centex (acting for Centex-Zachry) under the laws of the State of Delaware, and permits to do business in the State of Louisiana were obtained for them. The names of these additional mortgagor-builder corporations were Fort Polk Housing Corporation II, Fort Polk Housing Corporation III, Fort Polk Housing Corporation IV, Fort Polk Housing Corporation V, Fort Polk Housing Corporation VI, Fort Polk Housing Corporation VII, and Fort Polk Housing Corporation VIII.

16. Centex (acting for Centex-Zachry) undertook negotiations with various lending institutions for the financing of the Fort Polk housing project. As a result of these efforts, a commitment was obtained from the Republic National Bank of Dallas, a national banking association, to make loans in an aggregate amount equal to the total contract price. However, the commitment contained a limitation to the effect "that at no time shall the aggregate of the balances owing upon all of the mortgage notes exclusive of such mortgage notes as have been finally endorsed for insurance by Federal Housing Administration exceed $20,000,000.00."

17. The Republic National Bank of Dallas made application to the Federal Housing Administration for commitments by the FHA to insure the advances that were to be made by the bank to the eight mortgagor-builder corporations. Such application was approved by the Federal Housing Administration, which assigned a project number to each mortgage area. The names of the mortgagor-builder corporations for the several mortgage areas, the FHA project numbers, and the respective amounts of the FHA commitments for the several mortgage areas were as follows:

Mtge. Area	Name of Corporation	FHA Project No.	Amount
I	Fort Polk Housing Corp.	059-81005	$5,857,500
II	Fort Polk Housing Corp. II	059-81006	3,092,200
III	Fort Polk Housing Corp. III	059-81007	5,378,600
IV	Fort Polk Housing Corp. IV	059-81008	4,911,600
V	Fort Polk Housing Corp. V	059-81009	5,248,700
VI	Fort Polk Housing Corp. VI	059-81010	3,643,900
VII	Fort Polk Housing Corp. VII	059-81011	2,526,900
VIII	Fort Polk Housing Corp. VIII	059-81012	2,233,700

18. The closing provided for in the letter of acceptability, as amended, took place in Shreveport, Louisiana, on July 29-30, 1957, at the office of the Federal Housing Administra-

tion. As of that time, all the actions required of the eligible builder by subparagraphs a-n of paragraph 1 of the letter of acceptability, as amended (see finding 13), had been taken by Centex (acting for Centex-Zachry). On the occasion of the closing, all the required instruments were signed and delivered by the respective parties, and the mortgage notes applicable to the eight mortgage areas and FHA projects were duly endorsed on behalf of the Federal Housing Commissioner.

19. (a) One of the instruments signed and delivered on the occasion of the closing mentioned in finding 18 was a formal contract to cover the construction of the Fort Polk housing project. This contract was dated July 29, 1957, and was numbered DA-41-243-eng-3361. It was entered into between the defendant (acting through the District Engineer as contracting officer), the plaintiff (acting through Centex-Zachry), and the eight mortgagor-builder corporations. (This contract will usually be referred to hereafter in the findings as "the contract.")

(b) The contract recited (among other things) that the plaintiff (eligible builder) had submitted the lowest acceptable bid and had been determined to be qualified by experience and financial responsibility to construct housing of the type covered by the contract; that the Department of the Army had issued a letter of acceptability to the eligible builder; that the housing project provided for in the contract was to be financed by eight FHA-insured mortgages; that the eligible builder had caused mortgagor-builder corporations to be incorporated and, following such incorporation, had caused the stockholders thereof irrevocably to deliver to the eligible builder certificates representing all the capital stock of each mortgagor-builder for deposit in escrow with the mortgagee (the Republic National Bank of Dallas) and had further caused the officers and directors of each mortgagor-builder to execute and deliver to the eligible

builder their respective resignations effective on the date when the capital stock of the mortgagor-builder corporation was to be delivered to the Department of the Army, such resignations being deposited in escrow with the mortgagee; that the Department of the Army, contemporaneously with the delivery of the contract, had delivered to each mortgagor-builder a lease of the land upon which each corresponding FHA project covered by the contract was to be constructed; that each mortgagor-builder had made arrangements for the financing of the construction "of its corresponding FHA projects covered by this Housing Contract with one or more mortgage lenders * * *, which arrangements contemplate, with respect to each FHA project, the execution of a mortgage on the leasehold interest, to be insured by the Commissioner, as security for the repayment of the amount of the mortgage indebtedness"; that the Federal Housing Commissioner had issued to the mortgagee a commitment for insurance, including insurance for advances during construction, with respect to each mortgage; and that the eligible builder had reimbursed the Department of the Army for the design and development costs incurred by the Department with respect to the housing project, and had also paid the Department the fees for administration, supervision, and inspection of the project. Under the terms of the contract, the plaintiff was to "furnish all labor, material, tools, plant and equipment, and perform all services and work necessary to construct the housing project in accordance with the contract documents * * *." The work under the contract was to be commenced on or before August 9, 1957, and was to be "completed to the satisfaction of the Contracting Officer and the mortgagor-builder concerned within * * * 540 Calendar Days." The total contract price was to be $32,893,100, which was to be paid to plaintiff by the eight mortgagor-builders, and which was the same amount that was fixed in the letter of acceptability, as amended, and in the FHA commitments.

(c) The contract did not contain any provision expressly authorizing either party to terminate the contract for the convenience of such party.

20. (a) After the contract was signed, Centex (acting on behalf of Centex-Zachry, which was nominally the subcontractor but which actually owned the whole job) assumed the role of de facto prime contractor, negotiated with the persons or companies named below, and entered into subcontracts with them, or placed purchase orders with them, for the furnishing of supplies, materials, or services in connection with the performance of the work under the contract:

(1) Air-Way Corporation, Centerville, Ohio.

(2) Kitzman's Plumbing & Heating, Inc., Kitzman's Inc., Kitzman's of Florida, Inc., and Kitzman's Plumbing of Louisiana, Inc., a joint venture, La Mesa, California.

(3) Mid West Contracting Company, a proprietorship of B. F. Schoeneman, Dallas, Texas.

(4) Witte Gravel Company, Dallas, Texas.

(5) J. C. McBeath, Jackson, Mississippi.

(6) Armstrong Cork Co., Dallas, Texas.

(7) Barns Lumber Co., Dallas, Texas.

(8) Foxworth & Galbraith, Phoenix, Arizona.

(9) General Electric Supply Co., Dallas, Texas.

(10) Huey & Philp Co., Dallas, Texas.

(11) McCatee, Inc., Dallas, Texas.

(12) Salley Grocer Co., Inc.. Bernice, Louisiana.

(13) Simpson Redwood Co., Dallas, Texas.

(14) United Lumber Co., Portland, Oregon.

(15) Wood Protection Co., Houston, Texas.

(16) J. C. McBeath and/or J. C. McBeath-Grant Corporation, co-venturers, Jackson, Mississippi.

(17) A & B Electric, Lake Forest, Illinois.

(18) L & A Mill & Supply Co., Austin, Texas.

(19) Louisiana Termite Control, Baton Rouge, Louisiana.

(20) W. R. Cluer Millwork Co., Phoenix, Arizona.

(21) Southwest Steel Products, Houston, Texas.

(22) Guthrie Electrical Construction, Shreveport, Louisiana.

(23) H. H. Bain Roofing Co., Inc., Shreveport, Louisiana.

(24) Piper-Weatherford Co., Dallas, Texas.

(25) Phil Rich Fan Mfg. Co., Inc., Houston, Texas.

(26) American Concrete Company, Louisville, Kentucky.

(27) Klaas Bros., Inc., Phoenix, Arizona.

(28) United Tile Co., Inc., Shreveport, Louisiana.

(29) Southern Pine Panels, Inc., Princeton, Louisiana.

(30) S & S Contractors, Seattle, Washington.

(31) Irving L. Peabody, Houston, Texas.

(32) John Abney, Arlington, Texas.

(33) Texboro Cabinet Corporation, Mineral Wells, Texas.

(34) Delta Paving Company, Dallas, Texas.

(35) Dallas Title & Guaranty Company, Dallas, Texas.

(36) Aetna Casualty and Surety Company, Dallas, Texas.

(37) Standard Accident Insurance Company, Dallas, Texas.

(b) One of the subcontracts referred to in paragraph (a) of this finding was between Centex (acting on behalf of Centex-Zachry) and the Air-Way Corporation. Under this subcontract, which was dated October 8, 1957, the Air-Way Corporation agreed to install the heating systems in the 2,000 housing units at the Fort Polk housing project for $777,757. The amount to be paid to the Air-Way Corporation was subsequently reduced to $772,757 by an agreement of the parties made on December 12, 1957.

(c) Centex (acting for Centex-Zachry) entered into eight subcontracts on or about October 4, 1957, with the Kitzman's joint venture for the latter to furnish all the necessary labor, materials, and equipment and to perform all the necessary work required to install plumbing and gas fittings in the housing units within the eight mortgage areas that comprised the Fort Polk housing project. The total amount payable to the Kitzman's joint venture under the eight subcontracts was $1,939,200.

(d) Centex (acting for Centex-Zachry) entered into eight subcontracts on or about August 23, 1957, with the Mid West Contracting Company for the installation by the latter of water, sewer, gas, and storm-drainage facilities in the eight mortgage areas comprising the Fort Polk housing project. The total price to be paid to the Mid West Contracting Company under the eight subcontracts was $1,662,337.77.

(e) Centex (acting for Centex-Zachry) made an oral subcontract with the Witte Gravel Company under which the latter company was to furnish all the drainage-fill material required in the construction of the Fort Polk housing project at a price of $3.35 per cubic yard, less a discount of 10 cents per cubic yard for prompt payment.

(f) Centex (acting for Centex-Zachry) entered into a subcontract with the American Concrete Company and the latter, in turn, made an oral sub-subcontract with the Witte

Gravel Company whereby the Witte Gravel Company was to furnish all the sand and gravel required by the American Concrete Company in the performance of its subcontract, at a price of $3.35 per cubic yard for sand and $4.10 per cubic yard for gravel, less a discount of 10 cents per cubic yard in each instance for prompt payment.

(g) Centex (acting for Centex-Zachry) entered into a subcontract with the Delta Paving Company and the latter, in turn, entered into a written sub-subcontract with the Witte Gravel Company under which the Witte Gravel Company was to furnish 22,109 cubic yards of sand and 37,586 cubic yards of gravel to the Delta Paving Company at a price of $3.35 per cubic yard for sand and $4.10 per cubic yard for gravel, less a discount of 10 cents per cubic yard in each instance for prompt payment.

21. Work under the contract was commenced by Centex (acting for Centex-Zachry) on or before August 9, 1957, in accordance with the provisions of the contract.

22. After the work in connection with the construction of the Fort Polk housing project under the contract had been in progress for approximately 5 months, Centex received the following telegram from the contracting officer on January 18, 1958:

> All work under your contract No. DA-41-243-eng-3361 is hereby suspended immediately and until further notice. Pending such further notification you will cease all work. Place no further orders or subcontracts for materials, services or supplies. Suspend all orders on subcontracts for services, materials and supplies relating to this contract and spend no further money under this contract directly or indirectly or make any further commitments to obligate any further monies under this contract except as is necessary for the preservation and protection of supplies and materials on hand or enroute.

23. Upon receiving the telegram mentioned in finding 22, Centex promptly notified each subcontractor, supplier, and materialman of the suspension of the work under the contract by virtue of such telegram. All progress in the construction of the Fort Polk housing project thereupon came to a standstill pending the receipt of further instructions from the contracting officer or higher authority in the Department of the Army. At that time, the project was only 2.036 percent complete, and the work was substantially behind schedule.

24. The reason for ordering the suspension of the work under the contract was stated as follows in a letter from the Secretary of the Army to the Honorable Allen J. Ellender, United States Senator from Louisiana:

> The resources in manpower and money scheduled to be made available to the Army have made it necessary for the Department of the Army to re-evaluate the use being made of its present installations. * * *
>
> Since Fort Polk is included in the installations currently being examined, I feel that I should inform you regarding an action which the Army has of necessity just taken. Instructions have been issued to suspend further construction on the Capehart Housing Project at Fort Polk. This has been done to preclude commitment of additional funds on a project which may have to be cancelled. While much preliminary work has been accomplished under the current contract, no houses have yet been erected.

25. (a) On January 20, 1958, Centex-Zachry sent the following telegram in the plaintiff's name to the contracting officer:

> Retel 1/18/58. Contract DA-41-243-eng-3361 Fort Polk Capehart housing project. In accordance with the above we are notifying subcontractors suppliers and materialmen of your telegram. You are advised however that we are ready, able and willing to continue

performance of contract to completion and the suspension or cessation of work will result in increased cost and damage for which we will expect full indemnification by the United States.

(b) A copy of the telegram set out in paragraph (a) of this finding was transmitted by wire to the Secretary of the Army by Centex-Zachry on January 20, 1958.

26. In an effort to resolve the dilemma in which Centex-Zachry found itself because of the unexpected suspension of the work under the contract, the attorney for Centex-Zachry, as soon as the necessary arrangements for such conferences could be made, conferred with the contracting officer in Galveston and with the Secretary of the Army in Washington, D.C. At the conference with the Secretary of the Army, which was held on or about January 2, 1958, the Secretary was informed that firm subcontracts or other commitments, which involved a total of more than $14,000,000, had been made in connection with the construction of the Fort Polk housing project; that one subcontractor had purchased a lumber mill in the State of Oregon in order to supply lumber for the project; that another subcontractor had spent a considerable sum of money in putting up a batching plant at the project site in order to furnish ready-mix concrete; that another subcontractor had made substantial expenditures in order to supply gravel for the project; and that the aggregate amount of the claims that would be filed against Centex-Zachry because of the discontinuance of the work under the contract could not be accurately predicted. The Secretary's attention was called to the fact that the telegram of January 18, 1958, left the situation uncertain as to whether work under the contract would or would not be resumed at a later time. However, no definite guidance for Centex-Zachry was received from the Secretary of the Army at the time, as the future of Fort Polk was still under consideration in the Department of the Army.

27. On February 5, 1958, the contracting officer sent the following telegram to the plaintiff and Centex-Zachry:

> Contract No. DA-41-243-eng-3361 is hereby terminated for the convenience of the Govt. You will take all necessary steps to terminate and obtain proposals for the settlement of all outstanding commitments to subcontractors and suppliers and make no further commitments under this contract except as is necessary for the preservation and protection of supplies and materials on hand or enroute. Letter and instructions follow.

28. The telegram of February 5, 1958, was supplemented by a letter dated February 7, 1958, from the contracting officer to the plaintiff and Centex-Zachry. This letter stated as follows:

> 1. *Effective Date of Termination:* This letter will confirm the Government's telegram to you dated 5 Feb 58 terminating in its entirety your Contract No. DA-41-243-eng-3361 (hereinafter referred to as "the contract") for the convenience of the Government. Such termination is effective on the date and in the manner stated in such telegram, reference to which is hereby made.
>
> 2. *Cessation of Work and Notification to Your Immediate Subcontractors:*
>
> a. You shall stop all work, make no further shipments, and place no further orders in connection with the contract, except (1) to the extent that you may wish to retain and continue any work in process or other materials for your account, or (2) to the extent the Contracting Officer authorizes you to continue work in process for reasons of safety or to clear (or avoid damage to) equipment, or to avoid immediate complete spoilage of work in process having a definite commercial value or otherwise to prevent undue loss to the Government. If you believe the authorization referred to in subparagraph (2) above is necessary or advisable, you should immediately notify the Contracting Officer by telephone or personal conference

and obtain instructions. You shall keep adequate records of your compliance with this paragraph 2(a) showing (i) the date you received your Notice of Termination, (ii) the effective date of such termination and (iii) the extent of completion of performance on such effective date.

b. You shall give notice of termination to each of your immediate subcontractors (including suppliers) who will be affected by the termination of your Contract. In such notice, you shall (1) give him the number of your Contract with the Government, (2) state that it has been terminated for the convenience of the Government, (3) give him the name and address of the Contracting Officer, (4) instruct him to stop all work, to make no further shipments, to place no more orders, and to terminate all subcontracts under this contract with you (subject to the same exceptions stated in paragraph 2(a)), (5) direct him to submit his settlement proposal promptly in order to expedite settlement, and (6) request him to give similar notice and instructions to his immediate subcontractors.

3. The office named below will be in charge of the settlement of your claim. Further instructions will follow.

4. Please acknowledge receipt of this Notice as shown below.

29. After the telegram and letter mentioned in findings 27 and 28 were received, Centex promptly notified all subcontractors, suppliers, and materialmen regarding the termination of the contract and the consequent cancellation of all subcontracts and purchase orders.

30. The termination of the contract was not due to any fault on the part of Centex or of Centex-Zachry or of the plaintiff. Centex (acting for Centex-Zachry) was ready, willing, and able to complete the contract, and would have done so if the contract had not been terminated by the defendant. However, as the job was substantially behind schedule at the time when the work was suspended, and as bad weather conditions prevailed in the Fort Polk area

during a substantial part of the remaining period allowed by the contract for the completion of the work, it is estimated that a delay would have been experienced by Centex in completing the job, beyond the time fixed by the contract for the completion of the work.

31. (a) On February 14, 1958, the contracting officer wrote a letter to the plaintiff and Centex-Zachry, stating in part as follows:

> Reference is made to our telegram transmitted to you on 5 February 1958 terminating the above-referenced contract, and our letter dated 7 February 1958 confirming such telegram.
>
> Inclosed is a copy of the standard termination clause for fixed-price contracts. To facilitate the settlement of this terminated contract at an administrative level, you are requested to examine this clause and indicate whether you would be agreeable to its incorporation into the contract by modification. If agreeable, such action would require the prior approval of our higher authority.

(b) The "standard termination clause for fixed-price contracts" referred to in the letter of February 14, 1958, was the clause prescribed by Section 8.703 of the Armed Services Procurement Regulations (which comprised Subchapter A of Chapter I of Title 32, CFR (Rev. 1954)). That section provided in part as follows:

> § 8.703 *Termination clause for fixed-price construction contracts.* The following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000, except that Contracting Officers may, at their discretion, omit the termination clause from fixed-price construction contracts under $5,000 when the probability of termination for convenience is remote, as in contracts for repair, improvements, or additions to existing structures:
>
> TERMINATION FOR CONVENIENCE OF THE GOVERNMENT.
>
> (a) The performance of work under this contract may be terminated by the Government in accordance

with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

* * * * *

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with the certification prescribed by the Contracting Officer. * * *

(d) Subject to the provisions of paragraph (e), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount, or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit. * * *

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) In respect of all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of—

(i) The cost of such work;

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders * * *; and

(iii) A sum, equal to 2 percent of the part of the amount determined under subdivision (i) which represents the cost of articles or materials delivered to the

site but not incorporated in the work in place on the effective date of the Notice of Termination, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under subdivision (i) above, which amount for purposes of this subdivision (iii) shall exclude any charges for interest on borrowings; *Provided, however*, That if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (iii) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss.

(2) The reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b)(9) hereof; and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the Contractor as the result of the termination of work under this contract. * * *

* * * * * * *

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraphs (e) or (e) above * * *.

32. In reply to the letter of February 14, 1958 (see finding 31), Centex-Zachry wrote a letter in the plaintiff's name under the date of March 3, 1958, to the contracting officer, stating in part as follows:

After the Eligible Builder entered upon the performance of said contract, without authority by statute, law or the contract, the United States wrongfully cancelled the same.

At all times, the undersigned, the Eligible Builder, was ready, able and willing to fully perform this contract.

* * * * * * *

The undersigned is in a position to fully meet the burden of proof required by law as to its damages in the premises and such damages can and will be established with reasonable certainty.

You have heretofore presented to the undersigned an instrument in the nature of a modification of the above entitled and numbered contract and have requested that the undersigned agree to the same. The effect of such modification would (1) incorporate in the contract administrative termination procedure similar to that provided in the Armed Services Procurement Regulations, in derogation of our legal rights; (2) create a different measure of damages and procedure than that to which we are legally and contractually entitled; and (3) be in derogation of the rights of our subcontractors and materialmen.

Therefore, we respectfully decline so to agree.

Notwithstanding the above and foregoing paragraph, the undersigned wishes to assure you that, without prejudice to our rights under the law, we will negotiate with you for a full, final and complete settlement of our rights and damages in the premises, provided, however, that such negotiations will not be unduly prolonged or delayed to our detriment and prejudice.

33. After receiving the letter mentioned in finding 32, the contracting officer on March 5, 1958, wrote to the attorney for Centex-Zachry a letter which stated in part as follows:

Since you have declined to accept a modification to your contract to provide for an administrative settlement of your termination claim, I must seek further instructions from higher authority on this matter.

In the meantime, it would be appreciated if you would start compiling the subcontractors' claims and your own for discussion with me.

34. After the letter referred to in finding 33 was received, Centex got in touch with all the subcontractors, suppliers,

and materialmen, and requested that they submit their claims to Centex.

35. On March 20, 1958, the contracting officer wrote the following letter to the attorney for Centex-Zachry:

> Reference is made to your letter dated 3 March 1958 advising that a modification incorporating a termination procedure into the contract would not be acceptable to the Eligible Builder. You conclude that without prejudice to your rights, you would be willing to negotiate toward a settlement without a termination clause.
>
> In the interest of cooperation, and with a view toward a speedy and fair settlement of your rights under the terminated contract, I offer the following for your consideration:
>
> a. Negotiation be carried on with the Eligible Builder of its claim and, with his consent, of as many subordinate claims as may be possible;
>
> b. the subject matter of these negotiations will center on establishing the out-of-pocket expenses incurred and a reasonable profit on work accomplished and effort expended;
>
> c. Any agreements representing settlements with subcontractors or suppliers will be evidenced by a supplemental agreement to the housing contract which will completely release the Government with respect to such settlements upon payment of the amounts indicated to the prime contractor, using an adaptation of form prescribed in ASPR 8-712.2 (previously furnished you);
>
> d. If agreement can be reached on costs and not profit, the Contracting Officer can include what profit he deems reasonable for work accomplished and effort expended, in the proposed settlement;
>
> e. in such cases (ref d, above), the settlement will be evidenced by a supplemental agreement but there will be included a provision that such agreement will not

prejudice the claimant's right to assert a claim for additional profit.

f. if any subcontractors or suppliers resist the efforts to accomplish settlements as indicated above, further attempt shall not be made to accomplish settlement and such parties will be listed as exclusions in any agreement with the Eligible Builder.

If the above approach meets with your approval, negotiations can begin soon after presentation of your claim, together with such subcontractor or supplier claims as you may wish considered at this time.

An early reply would be appreciated.

36. The reply of the attorney for Centex-Zachry to the contracting officer's letter of March 20, 1958, was dated March 24, 1958, and stated as follows:

This will acknowledge receipt of your letter dated March 20, 1958, in connection with procedure for settlement of claims by virtue of the termination of such contract.

We respectfully decline to negotiate a settlement on the basis outlined by you.

Without prejudice, however, to the rights of ourselves, our subcontractors, suppliers and those claiming under them to pursue our legal remedies, we will negotiate with you for a speedy and fair settlement of our claim (including the claims of our subcontractors and suppliers and those claiming under them) along the following lines: Upon receipt by us of our subcontractors' and suppliers' claims (which will necessarily include the claims of subcontractors and suppliers to such subcontractors and those claiming under them) we will file and present to you our claim and the claims of the others. These claims shall be properly itemized and authenticated. Thereafter, if we, as the Eligible Builder, agree to take by way of settlement a lesser amount than that which we or any of us claim or to which otherwise we have a legal right under the law, then we are free to do so, and the government will

thereupon be given a full and complete release with respect thereto upon payment of the agreed sum. With the consent of our subcontractors and suppliers and those claiming under them, it is agreeable to us that the government may settle the claims of such subcontractors, suppliers and those claiming under them and thereby and therefore relieve us or our bonding company from any liability in connection therewith. In the event that agreement is reached as to costs and expenses incurred in the performance of the contract and agreement cannot be reached as to the profit to which we are entitled, then it will be agreeable that the government pay us for such costs and expenses incurred and we will give the government a partial release as to the same which shall not include the profits to which we are entitled and shall provide that we may pursue our legal remedy to recover such profit. However, either we or those claiming by, through and under us are free at any time to break negotiations with you without prejudice and pursue our legal remedies.

As prime contractor we cannot do anything or agree to anything in derogation of our rights and the rights of those claiming by, through and under us. We will negotiate with you along the lines as above set out, provided that we obtain the consent of those claiming under us as aforesaid and provided further that such negotiations are without prejudice to our respective rights to pursue our legal remedies.

37. After further discussion, an agreement was reached between the contracting officer and Centex-Zachry at a meeting in Dallas, Texas, on April 17, 1958, concerning the procedure that should be followed in an effort to settle the claims growing out of the termination of the contract. The terms of this agreement were incorporated in a letter which was dated April 17, 1958, was signed by the contracting officer, was addressed to the plaintiff and Centex-Zachry, and stated as follows:

This letter constitutes a memorandum of our understanding as to procedures in regard to negotiation in

connection with the termination or cancellation of the above contract by the United States.

It is the desire of the Department of the Army to undertake the settlement by negotiation of the claims which may arise by reason of the termination of work under this contract. We recognize the position taken by the prime contractor with respect to the legal rights and remedies which they may have by reason of such action. We propose, therefore, to settle such matters as can be settled by agreement, reserving to you your full legal rights and remedies with respect to matters on which agreement cannot be reached. Insofar as subcontractors and suppliers or any who are claiming by or through the contractor, the same procedure will be followed, namely, upon receipt by the contracting officer of a copy of the claim, together with a copy of the obligating document on which such claim is based and an indication that the action proposed has the approval of the claimant and the prime contractor, that the contracting officer will undertake the settlement of such claim in whole or in part. Any such agreements will be evidenced by further modifications to the contract which will recite the terms of the agreements reached and will completely reserve to all parties all of their rights with respect to matters on which agreement has not been reached.

It is suggested that with respect to claims other than that of the prime contractor, the prime contractor address a letter to such claimants substantially as follows:

"The Government desires to settle all matters arising out of the termination of the prime contract by negotiation and that unless objection is taken by you, we propose to forward your claim to the contracting officer who, after audit verification, will undertake the negotiation of a settlement directly with you or with any subcontractors or suppliers under you.

"This action in no way will prejudice any rights which you may have against us by reason of our contract or order with you. In the event a full and com-

plete settlement is not possible, the acceptance by you of a partial settlement limited to those matters on which agreement has been reached will not prejudice your rights against us with respect to those matters on which agreement has not been reached. Upon notification by you of the agreement reached with the contracting officer, we will take the necessary action to obtain funds from the contracting officer and will promptly transmit such funds when they are received. It is our desire that you cooperate with us in this matter as we consider the proposed action to be a speedy solution of a difficult situation. A prompt reply indicating your concurrence in the proposed procedure is desired."

I, as the contracting officer, possess the authority to proceed as outlined herein, and I propose to take all necessary action to undertake within the limitations of reasonable time the complete settlement of all matters arising out of the termination of this contract, or failing in that, to reach a settlement on all matters on which an agreement can be reached; and in those areas wherein agreement cannot be reached, then, of course, you and your subcontractors may pursue their legal remedies without prejudice.

38. (a) In furtherance of the agreement referred to in finding 37, the defendant (acting through the District Engineer as contracting officer), the plaintiff (acting through Centex-Zachry), and the eight mortgagor-builder corporations—i.e., all the parties to the contract—signed a document which was denominated a "Supplemental Agreement" and provided as follows:

This Supplemetal Agreement, entered into this 17th day of April, 1958, by and among the United States of America, acting by and through the Department of the Army (hereinafter called the "DEPARTMENT") and represented by the Contracting Officer, and G. L. Christian and Associates, represented by Centex Construction Co., Inc., and H. B. Zachry Co., a joint venture, attorney in fact, (hereinafter called the eligible builder) and Fort Polk Housing Corporation, Fort Polk Hous-

ing Corporation II, Fort Polk Housing Corporation III, Fort Polk Housing Corporation IV, Fort Polk Housing Corporation V, Fort Polk Housing Corporation VI, Fort Polk Housing Corporation VII, and Fort Polk Housing Corporation VIII, Delaware Corporations, (hereinafter called the Mortgagor-Builder) do hereby agree as follows:

WHEREAS, Contract No. DA-41-243-ENG-3361 was entered into on 27 July 1967 by and between the above named parties for the construction of 2000 family housing units at Fort Polk, Louisiana, under the provisions of Public Law 345, 84th Congress, as amended; and

WHEREAS, the Department has terminated the performance of work under the contract; and

WHEREAS, the Eligible-Builder and those claiming by, through and under it may have claims by reason of such termination; and

WHEREAS, the Contracting Officer and the Eligible-Builder desire to settle by negotiation such claims, in whole or in part, and at the same time, without prejudice, reserve to the Eligible-Builder and those claiming by, through or under him the right to pursue any legal remedies which such parties may have arising out of such termination of the work under this contract on which agreement cannot be reached.

NOW THEREFORE:

It is agreed that to the extent any mutually agreeable settlements are negotiated further modifications to this contract will be entered into embodying the terms of such agreements and upon execution thereof the Department, notwithstanding any other provisions of this contract, will pay to the Eligible-Builder the sums agreed upon; Provided however, that there will be reserved in such modifications all rights and legal remedies as to any matters upon which mutual agreement has not been reached and; Provided further, that the Eligible-Builder has the right to withdraw from such negotiations at any time without prejudice to pursue

its legal remedies arising out of the termination of the work.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

(b) The agreement quoted in paragraph (a) of this finding was subsequently known as modification No. 1 to the contract.

39. (a) Pursuant to the agreement of April 17, 1958 (see findings 37 and 38), negotiations for settlement agreements with subcontractors, suppliers, and materialmen were undertaken. When settlement agreements were made, they were incorporated in modifications to the contract, as follows:

(1) Under modification No. 2:

(i) Partial settlement with Kitzman's Plumbing of Louisiana, Inc., in the amount of $30,000.

(ii) Partial settlement with Mid West Contracting Company in the amount of $40,000.

(iii) Partial settlement with Witte Gravel Company in the amount of $50,000.

(iv) Partial settlement with J. C. McBeath in the amount of $50,000.

(2) Under modification No. 3:

(i) Full settlement with Armstrong Cork Co. in the amount of $1.

(ii) Full settlement with Barns Lumber Co. in the amount of $1.

(iii) Full settlement with Foxworth & Galbraith in the amount of $936.88.

(iv) Full settlement with General Electric Supply Co. in the amount of $1.

(v) Full settlement with Huey & Philp Co. in the amount of $1.

(vi) Full settlement with Macatee, Inc., in the amount of $1.

(vii) Full settlement with Salley Grocer Co., Inc., in the amount of $358.

(viii) Full settlement with Simpson Redwood Co. in the amount of $1.

(ix) Full settlement with United Lumber Co. in the amount of $451.05.

(x) Full settlement with Wood Protection Co. in the amount of $1.

(3) Under modification No. 4:

Full settlement with J. C. McBeath and or J. C. McBeath—Grant Corporation, co-venturers, in the amount of $145,051.51.

(4) Under modification No. 5:

Full settlement with A & B Electric in the amount of $11,000.

(5) Under modification No. 6:

Partial settlement with Mid West Contracting Company (on behalf of Central Culvert Corporation) in the amount of $10,470.

(6) Under modification No. 7:

Full settlement with L & A Mill & Supply Co. in the amount of $897.

(7) Under modification No. 8:

Full settlement with Louisiana Termite Control in the amount of $9,300.

(8) Under modification No. 9:

Partial settlement with W. R. Cluer Millwork Co. (on behalf of Hollow Tree Redwood Company) in the amount of $10,000.

(9) Under modification No. 10:

Full settlement with Bowles & Edens Supply Co. (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $4,000.

(10) Under modification No. 11:

Full settlement with Southwest Steel Products in the amount of $23,000.

(11) Under modification No. 12:

(i) Full settlement with Dierks Forests, Inc. (second tier sub-subcontractor under W. R. Cluer Millwork Co.) in the amount of $12,750.

(ii) Full settlement with Ipik Door Company, Inc. (second tier sub-subcontractor under W. R. Cluer Millwork Co.) in the amount of $3,024.42.

(iii) Full settlement with Mauk Seattle Lumber Company (second tier sub-subcontractor under W. R. Cluer Millwork Co.) in the amount of $436.50 ($120 of the $436.50 was on behalf of Weiser Lumber Company, third tier supplier to Mauk Seattle Lumber Co.).

(12) Under Modification No. 13:

Partial settlement with W. R. Cluer Millwork Co. (on behalf of Hollow Tree Redwood Company) in the amount of $6,464.

(13) Under modification No. 14:

Full settlement with Brown & Thompson (second tier sub-subcontractor under Mid West Contracting Company) in the amount of $6,500.

(14) After modification No. 15:

Full settlement with Guthrie Electrical Construction in the amount of $33,339.63.

(15) Under modification No. 16:

Partial settlement with Witte Gravel Company in the amount of $40,000.

(16) Under modification No. 17:

(i) Full settlement with James B. Clow & Sons, Inc., (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $10,457.85.

(ii) Full settlement with Johns-Manville (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $3,287.66.

(iii) Full settlement with R. D. Wood Company (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $6,444.90.

(iv) Full settlement with J. L. Jolley Contracting Company (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $4,000.

(17) Under modification No. 18:

Full settlement with Central Culvert Corporation (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $10,898.37.

(18) Under modification No. 19:

(i) Full settlement with H. H. Bain Roofing Co., Inc., in the amount of $26,000.

(ii) Full settlement with Piper-Weatherford Co. in the amount of $4,500.

(iii) Full settlement with Phil Rich Fan Mfg. Co., Inc., in the amount of $6,500.

(19) Under modification No. 20:

Full settlement with John Abney (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $9,700.

(20) Under modification No. 21:

Partial settlement with American Concrete Company in the amount of $100,000.

(21) Under modification No. 22:

Full settlement with International Paper Company (second tier sub-subcontractor under W. R. Cluer Millwork Co.) in the amount of $4,637.44.

(22) Under modification No. 23:

Full settlement with Klaas Bros., Inc., in the amount of $30,000.

(23) Under modification No. 24:

Full settlement with A. Y. McDonald Mfg. Co. (second tier sub-subcontractor under Mid West Contracting Co.) in the amount of $41,016.15 ($6,016.15 of the $41,016.15 was on behalf of Revere Copper and Brass Incorporated, third tier supplier to A. Y. McDonald Mfg. Co.).

(24) Under modification No. 25:

Full settlement with Hollow Tree Redwood Company (second tier sub-subcontractor under W. R. Cluer Millwork Co.) in the amount of $1,301.60.

(25) Under modification No. 26:

Full settlement with United Tile Co., Inc., in the amount of $15,000.

(26) Under modification No. 27:

Full settlement with Southern Pine Panels, Inc., in the amount of $11,200.

(27) Under modification No. 28:

Full settlement with Stanley Building Specialties (second tier sub-subcontractor under W. R. Cluer Millwork Co.) in the amount of $54,000.

(28) Under modification No. 29:

Full settlement with S & G Contractors in the amount of $19,000.

(29) Under modification No. 30:

Full settlement with American Concrete Company in the amount of $10,000 (excluded from this settlement was any claim for costs which the American Concrete Company may have against Centex arising out of the claim of Witte Gravel Company under its agreement with the American Concrete Company, but included was the sum of $3,635.14 constituting payment in full of the amount due the Valley Electric Membership Corporation).

(30) Under modification No. 31:

Full settlement with Irving L. Peabody in the amount of $24,702.

(31) Under modification No. 32:

Full settlement with W. R. Cluer Millwork Co. in the amount of $90,000.

(32) Under modification No. 33:

Full settlement with John Abney in the amount of $24,000.

(33) Under modification No. 34:

Full settlement with Texboro Cabinet Corporation in the amount of $27,500.

(34) Under modification No. 35:

Full settlement with Delta Paving Company in the amount of $30,000 (excluded from this settlement was any claim for costs which Delta Paving Company may have against Centex arising out of the claim of Witte Gravel Company under its agreement with Delta Paving Company, but included was the sum of $2,614.55 representing reimbursement of the bond premium paid by Delta Paving Company).

(35) Under modification No. 36:

Partial settlement with Witte Gravel Company under its agreements with Delta Paving Company, American Concrete Company, and Centex in the amount of $35,398.56.

(36) Under modification No. 37:

Partial settlement with Air-Way Corporation in the amount of $786.56.

(b) The settlements referred to in paragraph (a) of this finding were effectuated by means of checks from the defendant drawn on appropriated funds and made payable to the various companies and individuals. The checks were transmitted by the defendant to Centex, which delivered the checks to, and obtained releases from, the several payees.

40. The following claims growing out of the termination of the contract have not been disposed of by administrative action, and they remain for disposition by the court in the present litigation:

(a) Claim of Centex-Zachry:

For unreimbursed costs	$ 177,902.67
For loss of anticipated profits	4,163,844.00
Total	4,341,746.67

(b) Claim of Air-Way Corporation:

For unreimbursed costs	$ 3,609.00
For loss of anticipated profits	134,948.95
Total	138,557.95

(c) Claim of Kitzman's Plumbing & Heating, Inc., Kitzman's, Inc., Kitzman's of Florida, Inc., and Kitzman's Plumbing of Louisiana, Inc., a joint venture:

For unreimbursed costs	$ 24,835.91
For loss of anticipated profits	366,476.17
Total	391,312.08

(d) Claim of Mid West Contracting Company:

For attorney's fee	$ 12,500.00
For loss of anticipated profits	150,000.00
Total	162,500.00

(e) Claim of Witte Gravel Company:

For loss of anticipated profits	$122,027.80

41. (a) Centex-Zachry incurred reasonable costs aggregating $2,726,493 (1) in acquiring the Fort Polk housing job from the plaintiff, (2) in partially performing the contract, and (3) as a result of the termination of the contract by the defendant. These costs were as follows:

Payment to the plaintiff on account of contract costs incurred by plaintiff (see finding 46)	$ 78,483
Architectural fees	952,398
Engineering fees	56,798
Blueprinting & engineering supplies	3,001
Job engineering	14,691
Site preparation	125,448
Drainage structure	10,665
Utility distribution	34,341
Electric power distribution	37,722
Miscellaneous material	2
Plumbing	128,393
Miscellaneous iron	7
Car & truck unloading	2,835
Job distribution	1,350
Equipment maintenance	3,250
Equipment fuel	1,820
Utility expense	3,034
Field office personnel travel expense	13,179
Expendable tools	430
Miscellaneous items	2,250
Ranges	13
Payroll taxes & insurance	5,963
Builders risk & equipment insurance	6,376
Performance bond	57,041
Sales taxes	4,005
FHA commitment fees	98,754
Financing fees	783,967
Title & recording fees	59,022
Leasehold expense	8,070
Organization expense	2,724
Home office overhead	30,556
Supervision	22,914
Field office	16,823
Temporary buildings	16,470
Office supplies and expenses	3,045

Rental, local	$ 3,934
Interest paid	78,352
Legal fees	58,484
Termination expense	2,883
Total	2,726,493

(b) The costs referred to in paragraph (a) of this finding were offset by progress payments that were made to Centex (for Centex-Zachry) under the contract in the aggregate amount of $2,761,123. These progress payments were received out of funds advanced by the Republic National Bank of Dallas, as mortgagee-lender, to the eight mortgagor-builder corporations, the repayment of such advances being insured by the Federal Housing Administration. Centex-Zachry has thus been paid $34,630 above its reasonable costs, which amount should be credited to the defendant.

42. At the time of the termination of the contract on February 5, 1958, the Air-Way Corporation had not done any work or incurred any expenses in preparation for the performance of its subcontract relative to the installation of heating systems (see finding 20(b)). However, in pursuance of the agreement that was reached on April 17, 1958, concerning the procedure that should be followed in an effort to settle the claims growing out of the termination of the contract (see findings 37 and 38), the Air-Way Corporation incurred reasonable legal and accounting expenses amounting to $1,270 in preparing its claim for administrative consideration. The Air-Way Corporation has not received any reimbursement for these expenses.

43. (a) Prior to the time of the termination of the contract on February 5, 1958, the Kitzman's joint venture had moved personnel and equipment to the site of the Fort Polk housing project, had constructed at the job site a plant for the prefabrication of fittings, had prefabricated a large

number of plumbing trees, and had done other work looking toward the performance of the eight subcontracts referred to in finding 20(c).

(b) The Kitzman's joint venture incurred the following reasonable costs (1) in partially performing the eight subcontracts referred to in finding 20(c) and (2) as a result of the termination of such subcontracts:

Material	$116,100.52
Labor	11,778.50
Payroll taxes & welfare fund	593.71
State sales taxes	2,322.01
Miscellaneous direct expense	4,675.02
Insurance & bond	11,774.40
Utilities	1,002.35
Warehouse construction	5,460.12
Repairs & maintenance	363.44
Gas, oil & grease	1,093.41
Rent, equipment & facilities	12,529.50
Small tools	2,589.79
Production supplies	1,663.77
Office supplies & expenses	1,677.49
Local taxes, licenses, & dues	136.40
Employees benefits	149.87
Miscellaneous	71.01
Supervision & office wages	18,845.55
Payroll taxes on supervision & office wages	878.79
Professional services	687.50
Travel & entertainment	1,521.71
Interest expense	5,611.46
Claim of Mission Appliance Co.	477.50
Total	202,003.82
Less purchase discounts rec'd	2,017.88
	199,985.94

The costs referred to above were partially offset by progress payments which the Kitzman's joint venture received from Centex (acting for Centex-Zachry) in the aggregate amount of $186,473.22. Therefore, the unreimbursed costs of the Kitzman's joint venture amounted to $13,512.72.

(c) In 1958, after the defendant had terminated the contract and after Centex (acting for Centex-Zachry) had terminated the eight subcontracts with the Kitzman's joint venture referred to in finding 20(c), the Kitzman's joint venture made an offer of $65,913.83 for some of the plumbing materials that were located at the site of the Fort Polk housing project. This offer was accepted by the defendant and the materials were turned over to the Kitzman's joint venture by the defendant. No payment has been made by the Kitzman's joint venture to the defendant in connection with this transaction.

44. Prior to the termination of the contract by the defendant on Febrtuary 5, 1958, and the consequent termination by Centex (acting for Centex-Zachry) of the eight subcontracts referred to in finding 20(d), the Mid West Contracting Company had begun operations at the site of the Fort Polk housing project, had entered into sub-subcontracts with certain suppliers, and had ordered materials from other suppliers. The Mid West Contracting Company has been reimbursed for all the expenses that it incurred up to the time of the termination of the contract and of Mid West's eight subcontracts; and all the claims of this company's sub-subcontractors and suppliers had been satisfied. However, following the termination of the contract and of Mid West's eight subcontracts, the Mid West Contracting Company incurred costs for reasonable legal fees amounting to $2,500 in connection with the disposition of the claims asserted by that company's sub-subcontractors and suppliers, and in connection with the preparation of that company's own claim for administrative consideration. The Mid West Contracting Company has not been reimbursed for these legal fees.

45. Prior to the termination of the contract on February 5, 1958, the Witte Gravel Company, in preparation for the furnishing of sand and gravel to Centex (for Centex-Zachry), the American Concrete Company, and the Delta Paving Company under the subcontract and the sub-subcontracts referred to in paragraphs (e), (f), and (g) of finding 20, had performed exploration work in an effort to find a deposit of suitable sand and gravel in the vicinity of Fort Polk, had located such a deposit, had leased the lands containing the deposit, had constructed a plant for the processing of the sand and gravel, and had begun to remove the overburden covering the deposit of sand and gravel. In doing so, the Witte Gravel Company incurred costs aggregating $125,398.86. The Witte Gravel Company has been reimbursed in full for these costs.

46. The plaintiff made a profit of $171,516.68 in disposing of the Fort Polk housing job to Centex-Zachry for $250,000 under the "Agreement to Sub-Contract with Irrevocable Power of Attorney Attached" dated June 27, 1957 (see finding 11). Thereafter, the plaintiff did not incur any expenses, actual or potential, in connection with the partial performance of the contract or as a result of the termination of the contract by the defendant. The financial interests of the plaintiff were not affected in any way by the termination of the contract.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, for the use and benefit of Centex Construction Company, Inc., and H. B. Zachry Company, a joint venture, and the various subcontractors, in accordance with the opinion herein. The amounts of recovery, if any, will be determined pursuant to Rule 38(c).

IN THE UNITED STATES COURT OF CLAIMS

No. 56-59

(Decided July 12, 1963)

G. L. CHRISTIAN AND ASSOCIATES

v.

THE UNITED STATES

Gilbert A. Cuneo for the plaintiff. *Norman R. Crozier, Jr., Chester H. Johnson* and *O. D. Hite, Richard C. Bogten, Chester E. Finn, William L. Hilbyer, William W. Sweet, Jr., Wilson Johnston* and *Cummings & Sellers* of counsel.

Carl Eardley, with whom was *Assistant Attorney General John W. Douglas*, for the defendant. *Irving Jaffe* and *Gerson B. Kramer* of counsel.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON PLAINTIFF'S MOTION FOR REHEARING AND REARGUMENT

DAVIS, *Judge*, delivered the opinion of the court:

Plaintiff's motion for rehearing and reargument raises, for the most part, issues which were not previously presented and were therefore not discussed in the court's opinion handed down on January 11, 1963, 312 F. 2d 418. The additional arguments all concern our refusal to award anticipated but unearned profits to the contractor and its subcontractors. We have considered these new contentions and have concluded that they require no change in our judgment or in the reasoning on which it is based.[1] This supplementary opinion treats mainly with the points which have not hitherto been explicitly considered.

[1] Similar contentions have recently been made, in brief and oral argument, in *J. W. Bateson Company, Inc.* v. *United States*, No. 365-60, also being decided today. We have taken account of those arguments.

1. We held in our original opinion that Section 8.703 of the Armed Services Procurement Regulations (ASPR) required, as a matter of law, the inclusion in plaintiff's housing contract of the standard form military article providing for the termination of construction contracts for the convenience of the Government. The Supreme Court has made it plain that validly issued military procurement regulations have the full force and effect of federal law, even to the extent of overriding inconsistent state legislation. *Paul v. United States*, 371 U.S. 245, 255 (1963); *Public Utilities Comm'n. of California v. United States*, 355 U.S. 534, 542-43 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956). But plaintiff now says, for the first time, that this particular section of the ASPR was promulgated without statutory authority and accordingly is bereft of the force of law.[2] The chief reason advanced is that the Armed Services Procurement Act of 1947, 62 Stat. 21 — the general military procurement statute — which was a principal legislative basis for Section 8.703, did not expressly refer to termination of military contracts. On this ground it is said that the Procurement Act wholly failed to cover the subject of contract-termination in any way, and that a new statute dealing specifically with such terminations would be necessary before the Defense Department (or its constituents) could issue binding regulations in that area. In support of this proposition, plaintiff cites the unsuccessful efforts which have been made to obtain such express legislation, as well as general state-

[2] In its original presentation, plaintiff did not challenge the validity of Section 8.703 as law, but only its applicability to plaintiff's contract. In accepting Commissioner White's recommended opinion, plaintiff acquiesced in his express ruling that Section 8.703, if applicable, was binding. Commissioner White was of the view that, though that section was binding, it was inapplicable to plaintiff's Capehart Act contract because it did not obligate appropriated funds.

ments by Defense Department officials and others which are interpreted as recognizing that the termination regulations set forth in ASPR are without statutory authority.

The basic defect in this argument is its failure to recognize that general legislation empowering, in broad terms, a government agency to procure and to make contracts normally covers all phases of that process—from the solicitation of bids or proposals, to the making of the contract, through its administration and performance, to its completion or termination. "The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase." *Priebe & Sons* v. *United States*, 332 U.S. 407, 413 (1947). Unless the Congress has prohibited the agency from entering some phase of the contractual process (or using some otherwise lawful method of contracting), a grant of wide and general authority to contract and procure will extend to all reasonable phases and methods. See *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 114 ff. (1954); *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534, 540-543 (1958); *Pool* v. *United States*, 371 U.S. 245, 251-255, 261-263 (1963); *United States* v. *Penn Foundry & Mfg. Co., Inc.*, 337 U.S. 198, 214-216 (1949) (opinion of Mr. Justice Douglas). There is a cardinal illustration in the history of contract-termination-for-convenience itself. It was not until July 1, 1944, that Congress enacted the Contract Settlement Act of 1944, 58 Stat. 649, establishing legislative standards and procedures for the termination of World War II contracts for the Government's convenience.[3] But for over two years before that time the War and Navy Departments had been using termination-for-convenience clauses in many of their contracts and had also been issuing regu-

[3] The Contract Settlement Act applied only to World War II contracts.

lations dealing with such provisions.[4] This was done principally under the generous umbrella of Title II of the First War Powers Act of December 18, 1941, 55 Stat. 838-39, authorizing the President to empower war agencies "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * *, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war * * *." (Executive Order No. 9001, 3 C.F.R., 1943 Cum. Supp. pp. 1054-1056, delegated this authority to the war agencies, cf. 40 Op. Atty. Gen. 225 (1942)). See also ch. 508, 54 Stat. 712; ch. 340, 56 Stat. 314, 316-317. Though the First War Powers Act did not refer specifically to contract-termination, its general terms authorized those departments procuring for war ends to employ such contract articles—as well as many other provisions and forms not mentioned in the statute. The Contract Settlement Act was passed in 1944, not because the war agencies were then powerless to issue termination regulations or to insist on termination-for-convenience clauses, but because it was considered appropriate to establish uniform *Congressional* standards enforced by a central civilian agency, and thus to confine and supervise the broad discretion hitherto exercised by the separate departments and agencies under the First War Powers Act (as well as the authority which the Comptroller General threatened to exercise). In short, the Settlement Act was felt to be wise and desirable, but

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[4] See Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems 449 (1944); Goldman, *Termination of War Department Contracts at the Option of the Government*, 42 Mich. L. Rev. 733 (1944); Dounis and Forman, *Historical Significance of Termination of Contracts for the Convenience of the Government*, 14 Fed. Bar J. 191, 204-211 (1954); *United States v. Penn Foundry & Mfg. Co., Inc.*, 337 U.S. 198, 214-216 (1949) (opinion of Mr. Justice Douglas).

it was not needed to confer *power* in the area of contract-termination.

With respect to this subject of contract-termination, the situation is the same under the Armed Services Procurement Act of 1947 (and its supplementing legislation) as it was under the First War Powers Act. The Procurement Act (now 10 U.S.C. §§ 2301 *et seq.*) is a broad charter conveying general authority to the service departments to enter into contracts by advertising, and in many circumstances into negotiated agreements. See H. Rep. No. 109, 80th Cong. 1st Sess., p. 6; S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. It clearly covers contracts for buildings, facilities, and public works. See 10 U.S.C. § 2303(b). Aside from specified requirements and prohibitions (not now pertinent), the Act leaves to the procuring agency the terms and conditions of both negotiated and advertised contracts. Many different types of agreements and contractual provisions can be, and have been, adopted under the sweeping authority accorded by the Act. In particular, the Act does not in any way prohibit or limit, expressly or by implication, the use of clauses providing for termination of a contract for the convenience of the Government. As in the period prior to the Contract Settlement Act of 1944, that subject is left to the discretion of the procuring agencies. Just as the comprehensive provisions of the First War Powers Act sanctioned the promulgation and use of termination clauses although termination was not mentioned in that statute, so the comprehensive terms of the Procurement Act authorized the promulgation of Section 8.703 of the ASPR. Buttressing the Procurement Act as the source of this provision are the general statutory sections authorizing the Defense and Service Secretaries to adopt directives and regulations in their fields of competence, including procurement. See *Congress Construction Corp.* v. *United States*, Ct. Cl. No. 535-59, decided March 6, 1963, slip op., p. 6; 314 F. 2d 527, 531 (Secretary of Defense); 10 U.S.C. § 3012 (Secretary of the

Army); 10 U.S.C. § 8012 (Secretary of the Air Force); 5 U.S.C. § 22 (general authority to issue departmental regulations).[5] The basic administrative authority of the military departments to adjust claims of the termination kind has, of course, long been established. *Cannon Construction Company, Inc. v. United States*, Ct. Cl., No. 89-57, decided June 7, 1963.

When Section VIII of the ASPR (dealing with contract termination) was issued in 1952, the Defense Department declared that, while the Procurement Act does not specifically mention terminations, the new termination regulation was being issued "under the general authority of the Secretaries of the Military Departments, based on the Procurement Act and other statutes, to issue detailed regulations to carry out their authority and responsibilities." The authority thus invoked was adequate to sustain termination regulations of this type—though no doubt the legislative foundation could be strengthened and supplemented by more explicit Congressional action.

Plaintiff stresses the lack of detailed legislative policies on termination, but the absence of such Congressional spelling-out is very different from the absence of any authority in the administrators under their general procurement powers. The experience under the First War Powers Act, among others, shows that procurement administrators can properly act under broad and general authority until Congress sees fit to channel and guide their conduct more precisely. We do not read the Army and Navy textbooks on procurement or contract law, cited by plaintiff, as denying this general authority. As we understand them, they say only that—since no statute (like the Contract Settlement Act of 1944) specifically covers the field of termi-

[5] Both the Army and Air Force Departments adopted, in substance, the ASPR regulation on termination, including Section 8.703. Plaintiff's contract was with the Army; the J. W. Bateson Company, Inc. (see fn. 1, *supra*) dealt with the Air Force.

nation, requires the inclusion of a termination-for-convenience article, and prescribes termination procedures—the ASPR termination procedures must find their basis in a contractual termination article, which can be incorporated in the contract "by reference or otherwise."[6] Under Section 8.703, such an article was required to be included in plaintiff's contract and therefore it was incorporated "by reference or otherwise." In addition, as we point out below (see also our original opinion, slip. op., p. 14, 312 F. 2d at 427), there are four explicit references in the housing contract and accompanying agreements to a "termination of the Housing Contract for the convenience of the Government." This, too, can be deemed an incorporation of the standard article "by reference."

In the light of the lack of legislative specificity, the continued interest in a special termination statute (akin to the Contract Settlement Act of 1944) can be readily seen as primarily rooted in a desire for (i) firmer and more specific Congressional guidance and sanction, (ii) greater uniformity in policies and procedures, and (iii) certain changes in existing administrative practices. This is the clear motivation of the Chamber of Commerce statement ("Why a Contract Settlement Law?"), cited by plaintiff in its motion for rehearing—not the absence of any legislative authority for the current administrative regulations.

2. The Supreme Court's rulings in *Paul, Public Utilities Commission of California*, and *Leslie Miller, Inc.*, cited *supra*, require that, once Section 8.703 of the ASPR is rec-

[6] The Army's textbook is *Procurement Law* (1961) p. 407; the Navy's is *Navy Contract Law* (1959), § 5.29. The Air Force textbook (*Air Force Procurement: Prices and Profits* (1953), p. 113) is worded less carefully and seems to say (incorrectly, we believe) that Section 8.703 "has no statutory *warrant*" (emphasis added). It may be that the authors meant no more than that there was no statute *requiring* such provisions.

ognized as validly authorized, it must be accorded the full effect of federal law. We have already pointed out the statutory authority for this section (and the standard article it requires) in the Procurement Act of 1947 and supplementing legislation. The history of contract-termination over the past decades (sketched in our original opinion) proves the propriety and reasonableness of the normal articles for a convenience-termination. Regulations reasonably adapted to the administration of a Congressional act, and not inconsistent with any statute, have "the force and effect of law." *See, e.g., Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920); *United States v. Barnard*, 255 F. 2d 589, 589-90 (C.A. 10, 1958), *cert. denied*, 358 U.S. 919. It follows that, if Section 8.703 applied, it demanded the inclusion of the standard article in plaintiff's contract and that contract must be interpreted to comply (at least if it is to be held a valid agreement on which plaintiff can sue).

Plaintiff admits that, if a statute requires the inclusion of termination clause, such a provision would be read into the agreement, whether the negotiators put it there or not. But great objection is laid against the incorporation of an article into a new contract by means of a valid pre-existing regulation.[7] It is difficult to see why this should be so when, as the Supreme Court cases demonstrate, "mere" regulations can supersede state laws which would otherwise control; giving the regulations the status of law equates them fully to federal legislation. The concept of such incorporation is not novel. A well-known example is Executive Order No. 9001 (implementing the First War Powers Act), *supra*, which expressly required, without *specific* statutory foundation, that World War II contracts should contain

[7] We are concerned, of course, only with a regulation antedating the making of the contract. There is no question here of a unilateral attempt by the Government to modify a pre-existing agreement. That would raise wholly different problems.

a covenant-against-contingent-fees, as well as an anti-discrimination clause. If the contracts were to be deemed valid these articles had to be read as part of all war procurement agreements, whether or not they were physically incorporated. Conversely, the President forbade the cost-plus-a-percentage-of-cost system of contracting or the payment of fixed fee of more than 7% of estimated cost. No contract could transgress these requirements. See, also, Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 Col. L. Rev. 243, esp. 248-49 (1963); Van Cleve, *The Use of Federal Procurement To Achieve National Goals*, 1961 Wis. L. Rev. 566. It was important then, and it is important now, that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials, or by a concert of contractor and contracting officer. To accept plaintiff's plea that a regulation is powerless to incorporate a provision into a new contract would be to hobble the very policies which the appointed rule-makers consider significant enough to call for a mandatory regulation. Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against *ad hoc* encroachment or dispensation by the executive (see, *e.g.*, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520 (1961)). There is a comparable need to protect the significant policies of superior administrators from sapping by subordinates.

Like other individuals who deal with the Federal Government (see, *e.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947)), potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make. Our concern is not at all whether the policy of embodying mandatory contractual provisions in regulations is the best one. Our special interest is only the legality of such a practice, and we hold that, in the procure-

ment field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government.[8]

7 Plaintiff also contends that, in any event, the termination provisions of the ASPR do not, under their own terms, control the contract at bar because none of the termination regulations apply except where (a) the agreement already contains a termination article, and (b) the contract is made under the Procurement Act (and not under the Capehart Act). We find neither contention to be sound.

(a). Plaintiff founds its argument, that Section 8.703 requiring the standard termination-for-convenience article for construction contracts of the size of plaintiff's) concerns only contracts *already* containing such an article, on Section 8.101 of the ASPR which declares that the termination *part* of the Procurement Regulations (Section VIII) "applies to contracts entered into under the [Procurement] Act which by their terms provide for termination thereof for the convenience of the Government", and also that contracts not containing such a clause (or a clause differing from the standard clauses) "may be amended to include or substitute a standard clause." But these portions of Section 8.101 do not have the meaning plaintiff attributes to them. By its very wording, the impact of Section 8.703, expressly directing that a certain standard clause "*shall* be inserted" (emphasis added) in construction contracts," could not and does not depend

[8] For an early example of a regulation governing the making and content of contracts, see *Whiteside* v. *United States*, 93 U.S. 247 (1876).

[9] See also Section 8.102, promulgated February 29, 1952, directing that "the appropriate Standard Termination Clause" set forth in the termination regulations "shall be inserted, to the extent prescribed" in the regulations "in contracts executed as of a date on or after March 1, 1952 * * *."

upon the *pre*-existence of such a clause in the contract. Rather, the clue to Section 8.101 is that Section VIII, the termination portion of the Procurement Regulations, contains an elaborate set of *procedures and practices* to be followed upon the termination of a contract. The purpose of Section 8.101, referring as it does to "this *part*" (*i.e.*, the whole termination regulation), is to make these *procedures and practices* (which are not embodied directly in any contract, or required to be so embodied) applicable to contracts which contain, either expressly or by incorporation, a termination-for-convenience clause—and only to such contracts. Not all contracts were (or are) required to have such a clause; and if the clause were not required to be included in an agreement the procedures and practices of Section VIII of the Procurement Regulations would not control, even if the Government should thereafter elect to terminate the contract for its own convenience.

The sentence in Section 8.101 saying that contracts without any of the new standard termination clauses can be amended to include one—on which plaintiff also relies—was obviously placed in the regulations to cover contracts already in existence before the issuance of the new termination regulation. Section VIII, the termination part of the ASPR, was promulgated in February 1952. Section 8.102 (footnote 9, *supra*), as well as Section 8.703, ordered the new standard-form termination clauses to be used in the appropriate future contracts. One of the purposes of Section 8.101 was to afford the Government and a contractor the right to conform already-existing contracts to the new standards, by agreement, if they wished to do so. The section did not controvert the mandatory requirement of Section 8.703 (and its kin) that future contracts were to include the new article.[10]

[10] The military textbooks and materials plaintiff cites, as supporting its position, are in accord with Section 8.101 as we have ex-

(*b*). Another of plaintiff's arguments is that the termination regulation applied, by its own terms, only to contracts under the Procurement Act of 1947, and plaintiff's contract was not made under that statute but under the Capehart Act. It is true that the housing conract referred specifically only to the Capehart Act, which was the explicit authority for the Government to undertake the elaborate tri-partite arrangement under which Capehart Act housing was erected and maintained—including the leasing of land to the private party, the insuring of the loan, the payment of the mortgage indebtedness by the Government, and the operation of the housing project. But the housing contract itself was primarily a construction contract, and the general provisions of the Procurement Act authorized the armed services to make construction contracts of various types; since its enactment that Act has been the main basis upon which military construction contracts have been founded. Special legislation may provide additional authority or limitations for certain projects or kinds of agreements, but that supplemental authority does not eliminate the general grant given to the military departments by the 1947 statute. Plaintiff's housing contract was grounded in part upon the special implementing provisions of the Capehart Act but, as a construction contract, it also drew basic authority from the Procurement Act.[11] The former statute expressly requires that construction contracts for the housing projects shall be made by competitive bidding as provided in the Procurement Act (42 U.S.C. § 1594(a)). The failure of the com-

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plained it. The textbooks make it plain that the "whole termination system established by ASPR Section VIII"—*i.e.*, the detailed procedures and practices—are not themselves incorporated directly into the contract but become applicable through the standard termination article.

[11] Section 1.101 of ASPR provided that the Procurement Regulations apply generally to procurement of supplies and services under the Procurement Act or under other statutory authorization.

tract to mention the latter is no more significant than if some other construction contract had referred only to the appropriation legislation granting the money for the buildings or the act authorizing a new military base on which the buildings were to be erected; the general authority of the Procurement Act would nevertheless be involved.

4. Plaintiff's next point is that, even if Section 8.703 would otherwise apply, there was sufficient administrative authorization to omit the standard termination article from Capehart Act housing contracts. The essence of this contention is that a special form of contract was drawn up by the Defense Department and the Federal Housing Administration for Capehart Act projects, differing in many of its articles from the standard forms and leaving out a termination-for-convenience clause. Undoubtedly, the Secretary of Defense—who had general supervisory authority over the Procurement Regulations, as well as a specific grant of power under the Capehart Act to include in the housing contract such terms and conditions as he considered necessary—could have decided that Capehart Act construction contracts, unlike other military construction agreements, should not be terminated for the Government's convenience without rendering the United States liable for anticipated but unearned profits. The question is whether it has been shown that he (or a proper delegate) did make that choice. We think not.

(*a*). The Armed Services Procurement Regulations contemplated a specific mechanism for receiving permission to deviate from required forms or articles. See 32 C.F.R. 400.108 (1954 rev.) and 32 C.F.R. 1.109 (1956 rev.). There is no proof, or offer to prove, that this mechanism was used. It is said, however, that the general agreement of the Assistant Secretary of Defense (Properties and Installations) with the Federal Housing Commissioner upon a number of forms, including a form of housing contract, constituted sufficient permission to eliminate the termina-

tion-for-convenience clause. Here, too, there is lacking any proof that this particular Assistant Secretary was empowered to approve alterations in articles mandatorily required by the ASPR. More importantly, we are not persuaded that a conscious decision was made, at the appropriate level in the Defense Department, to eliminate the required termination article and thus to subject the Government to the full common-law measures of damages (including unearned profits). We are informed by plaintiff (as well as by the plaintiff in *J. W. Bateson Company, Inc.* v. *United States*, Ct. Cl., No. 365-60) that there was no discussion—either between the contractors and the Government or while the form of housing contract was being drawn up by the Government officials—as to the inclusion or omission of the standard-form article. There is therefore no direct showing of such a conscious election to omit the termination provision.[12]

(*b*). Plaintiff insists that such an affirmative decision as to termination must nevertheless be implied from (i) the use in the housing contract of *other* standard articles, coupled with the omission of the termination-for-convenience clause, and (ii) an understanding with Congress, reflected in the Capehart Act, that the projects would not be cancelled. The fact that the housing contract employed

[12] Plaintiff has filed an affidavit by one of the subordinate officials in the Federal Housing Administration, who participated in 1955 and 1956, together with other F.H.A. officials and Department of Defense representatives, in drafting the general form of Capehart Act housing contract, saying (in addition to the fact that none of the participants mentioned the standard article) that "no one ever considered that a Capehart project would ever be cancelled" and summarily suggesting that there was an unstated understanding to this effect. General "testimony" of this type, even if given at a trial, would plainly be inadmissible; in any case, such imprecise and conclusory generalities are wholly inadequate to sustain a finding that the proper Army or Defense Department officers affirmatively dispensed with the regulatory requirement of the standard termination clause.

variations of the standard clause for "disputes", "changes", etc.—to accommodate the role of the F.H.A. in the administration of the contract, and to cover other special circumstances of Capehart Act projets—does not mean that the uniform termination clause was deliberately rejected by officials in the Defense Department empowered to make that choice. The matter may never have been brought to their attention, or, if it were, they may have thought that the four explicit references in the contract (and its accompanying agreements) to "termination for convenience" of the Government adequately incorporated the standard article on that subject.

Plaintiff also errs in thinking that projects under the Capehart Act were never to be cancelled. The Act required (70 Stat. 1018-19) the Secretary of Defense to submit to Congress a report "stating the intent to construct or acquire such [housing] units," and "certifying that the number of units to be constructed or acquired is consistent with the long-range troop strength to be stationed at the location of such unit." This is a certification of present understanding and present intent. It is a far cry from a guaranty that the project would not be cancelled, no matter what unforseen changes in military requirements might occur. The predecessor Wherry Act contained a comparable certification requirement, but this court held that nothing equivalent to a guaranty was intended and that "Congress must have been aware that the requirement for a fluid military establishment made it impossible to represent that a military installation would not be deactivated or curtailed for the indefinite future." *Henry Barracks Housing Corp.* v. *United States*, 150 Ct. Cl. 689, 695, 281 F. 2d 196, 200 (1960). As under the Wherry Act a Capehart Act contractor must have been aware "of the inability of the Government, or any government, to guarantee that defense needs are immutable" (699, 281 F. 2d at 202).

(c). In addition to the absence of a persuasive showing that a proper Defense Department officer chose to waive the requirement for a convenience-termination clause, there is affirmative evidence that no such election was made. We pointed out in our original opinion (slip op. p. 14, 312 F. 2d at 427), and mention above, that there are four express references to termination-for-convenience in the contractual papers. The housing contract itself twice mentions "termination of the Housing Contract for the convenience of the Department prior to completion of the project"; the accompanying building loan agreement provides for certain action "if the Housing Contract shall be completely terminated for the convenience of the Department prior to completion of the project"; and the companion guaranty-with-respect-to-mortgage payments refers to "the complete termination of the Housing Contract for the convenience of the Department prior to completion of the F.H.A. project."

Plaintiff minimizes these explicit references as included solely to satisfy private lenders who were afraid that the Government might cancel the housing contract even though there was no authority to do so. It is difficult to accept this as the correct explanation for the reiterated inclusion of these phrases. One of the citations in the housing contract deals not only with the lender but with the plaintiff itself. The other three references directly concern only the lender, but they limit the Government's liability to that party to the monies advanced up to the date of termination and waive other claims. If plaintiff were right, such termination by the Government would constitute an outright breach and the lender might be entitled to unearned interest, just as the plaintiff-builder would be entitled to unearned profits; the lenders would have been better off not to press for the "protection" plaintiff says they sought. Moreover, if plaintiff were right, there would be no need for these special references to termination since the normal

law of contracts would give the lenders all necessary protection against the injurious consequences of a breach by the Government.[13]

Above all, we cannot believe the familiar and established phrase "termination for the convenience of the Department" meant, in this contract, a cancellation which would be a breach of contract. At least since the early days of World War II (if not earlier), the concept of "termination for convenience" has been well understood as a termination authorized by the contract which would *not* be a breach. See, *e.g., United States* v. *Penn Foundry & Mfg. Co., Inc.*, 337 U.S. 198, 214-216 (1949) (opinion of Mr. Justice Douglas). That term is not normally used, if it is ever used, in Government contractual documents to refer to a cancellation by the United States which violates the agreement. If such a breach-cancellation were meant, the parties would have used other words such as "cancellation", "breach", "stoppage", "default", or perhaps "termination" unqualified by any reference to the convenience of the Department or the Government. They did not do so and we are justified in reading the precise words they employed as referring to a termination authorized by the housing contract, not in breach of it. When the Government terminated the contract, it acted as if it had that right; it informed the contractor that the agreement "is hereby terminated for the convenience of the Govt."

(*d*). In sum, we hold that plaintiff has failed to show that the mandatory requirement of Section 8.703 was de-

[13] Plaintiff also says that the lenders were afraid that the Government and the builder might *later* agree to insert a termination-for-convenience provision. This, too, seems farfetched as the explanation of the four express and straightforward references—saying nothing of a later amendment but phrased as if a present right to terminate existed—especially since the lenders would undoubtedly be safeguarded by their participation, or by the law, in the event of a change in the housing contract which was material to their interests.

liberately waived by a military official empowered to do so. The plaintiff and other Capehart Act contractors may have thought that there could be no termination of these housing contracts for the Government's convenience, and some Government personnel may have had the same view—although the specific contractual references should have been warning to both groups. But that misunderstanding cannot substitute for a valid, deliberate, authorization to by-pass the regulation. As suggested in our original opinion, the general policy against subjecting the Government to liability for unearned profits on military contracts is strong and important. For military construction contracts, that policy was embodied in Section 8.703. If we were to find that the competent administrators dispensed with that significant requirement for this particular group of construction contracts, we would need to have a far more definitive showing than has been made here (or in *J. W. Bateson Company, Inc.* v. *United States*, No. 365-60).

5. On the issue of whether plaintiff's contract "obligated appropriated funds" under the ASPR, discussed at some length in our prior opinion, we add only one comment. The two cases cited in the rehearing motion (*Continental Casualty Co.* v. *United States ex rel. Robertson Lumber Co.*, 305 F.2d 794 (C.A. 8, 1962), *cert. denied*, 371 U.S. 922; *United States ex rel. Miles Lumber Co.* v. *Harrison & Grimshaw Const. Co.*, 305 F. 2d 363 (C.A. 10, 1962), *cert. denied*, 371 U.S. 920) are not opposed, in theory or holding, to our ruling in the original opinion. The sole question in those cases was whether, in a Capehart Act project, the notice required under Miller Act bonds (40 U.S.C. § 270a) was sufficient for a suit against the surety, or whether the special notice imposed by the Capehart Act bonds was required. The courts held that the special Capehart Act requirements had to be followed. The issue in those cases was quite different from that before this court and the pertinent considerations dissimilar. With respect to the subject of appropriated funds, both circuits said no more than that private funds

are initially used in Capehart Act projects, the use of appropriated funds coming later. We agree, of course, with that statement, but, for the reasons given in our earlier opinion it does not determine whether the housing contract "obligated appropriated funds" within the meaning of the Armed Services Procurement Regulations.

Plaintiff's motion for rehearing and reargument is denied.

APPENDIX B

Pertinent Provisions of Statutes and Regulations Involved

42 U.S.C. § 1594 (1958) of the Capehart Housing Act provides insofar as pertinent:

§ 1594. Contracts for construction.

(a) Contract provisions; competitive bids.

> The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. . . . *Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. . . .* Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41 [The Armed Services Procurement Act, now 10 U.S.C. § 2304 (1958)]. [Emphasis added.]

5 U.S.C. § 22 (1958) states:

> § 22. Departmental regulations. The head of each department is authorized to prescribe regulations, not

inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

The Armed Services Procurement Act of 1947, as slightly changed and recodified, is found in Chapter 137 of 10 U.S.C. (1958).

§ 2301. Declaration of policy.

It is the policy of Congress that a fair proportion of the purchases and contracts made under the chapter be placed with small business concerns.

§ 2302. Definitions.

In this chapter—

(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration.

(2) "Negotiate" means make without formal advertising.

(3) "Formal advertising" means advertising as prescribed by section 2305 of this title.

§ 2303. Applicability of chapter.

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

(1) The Department of the Army.
(2) The Department of the Navy.
(3) The Department of the Air Force.
(4) The Coast Guard.
(5) The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including—

(1) public works;
(2) buildings;
(3) facilities;
(4) vessels;
(5) floating equipment;
(6) aircraft;
(7) parts;
(8) accessories;
(9) equipment; and
(10) machine tools.

(c) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alternation.

§ 2304. Purchases and contracts: formal advertising; exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) the public exigency will not permit the delay incident to advertising;

(3) the aggregate amount involved is not more than $2,500;

(4) the purchase or contract is for personal or professional services;

(5) the purchase or contract is for any service by a university, college, or other educational institution;

(6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;

(7) the purchase or contract is for medicine or medical supplies;

(8) the purchase or contract is for property for authorized resale;

(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

(11) the purchase or contract is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;

(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising and competitive bidding might require duplication of investment or preparation already made or would unduly delay the procurement of that property; or

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity

to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

(17) negotiation of the purchase or contract is otherwise authorized by law.

(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7)—(17) of subsection (a) shall be kept by the contracting agency or six years after the date of final payment on the contract.

(c) This section does not authorize—

(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewer main, or similar item, unless—

(A) it is made under clauses (1)—(3), (10)—(12), or (15) of subsection (a); or

(B) it is to be performed outside the United States; or

(2) the erection, repair, or furnishing of any public building or public improvement.

(d) Whenever the head of the agency determines it to be practicable, such advance publicity as he considers suitable with regard to the property involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property or a service, under clause

(7) or (8) of subsection (c) involving more than $10,000.

(e) A report shall be made to Congress, on May 19 and November 19 of each year, of the purchases and contracts made under clauses (11) and (16) of subsection (a) during the period since the date of the last report. The report shall—

(1) name each contractor;

(2) state the amount of each contract; and

(3) describe, with consideration of the national security, the property and services covered by each contract.

(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

(1) Sections 35—45 of title 41.

(2) Sections 276a—276a-5 of title 40.

(3) Sections 321 and 325a of title 40.

§ 2305. Formal advertisements for bids; time; opening; award; rejection.

(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned.

(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachements are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

§ 2306. Kinds of contracts.

(a) The cost-plus-a-percentage-of-cost-system of contracting may not be used. Subject to this limitation and subject to subsections (b)—(e), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract negotiated under section 2304 of this title shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

(c) No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under section 2304 of this title, unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of

the kind or quality required except under such a contract.

(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(e) Each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

(1) a cost-plus-a-fixed-fee subcontract; or

(2) a fixed-price subcontract or purchase order involving more than $25,000 or 5 percent of the estimated cost of the prime contract.

§ 2307. Advanced payments.

(a) The head of any agency may—

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the

agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

§ 2308. Assignment and delegation of procurement functions and responsibilities.

Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies—

(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and

(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.

§ 2309. Allocation of appropriations.

(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury.

(b) A disbursing officer of the allotting agency may make any disbursement chargeable to an allotment under subsection (a) upon a voucher certified by an officer or civilian employee of the procuring agency.

§ 2310. Determinations and decisions.

(a) Determination and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or for a class of purchases or contracts. Such a determination or decision is final.

(b) Each determination or decision under clauses (11)—(16) of section 2304 (a), section 2306, or section 2307 (e) of this title shall be based on a written finding by the person making the determination or decision. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.

§ 2311. Delegation.

The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions under clauses (11)—(16) of section 2304 (a) of this title. However, the power to make a determination or decision under section 2304 (a) (11) of this title may be delegated only to a chief officer or official of that agency who is responsible for procurement, and only for contracts requiring the expenditure of not more than $25,000.

§ 2312. Remission of liquidated damages.

Upon the recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in performing a contract made by that agency that provides for such damages.

§ 2313. Examination of books and records of contractor.

(a) An agency named in section 2303 of this title is entitled, through an authorized representative, to inspect the plant and audit the books and records of—

(1) a contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter; and

(2) a subcontractor performing any subcontract under a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter.

(b) Each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

§ 2314. Laws inapplicable to agencies named in section 2303 of this title.

Sections 5, 6, 6a, and 13 of title 41 do not apply to the procurement of property or services by the agencies named in section 2303 of this title.

The pertinent provisions of the Armed Services Procurement Regulations as found in 32 C.F.R. (Rev., 1954), provide:

§ 1.102 *Applicability of subchapter* [all of ASPR]. This subchapter shall apply to all purchases and contracts made by the Department of Defense, within or outside the continental United States, for the procurement of supplies or services which obligate appropriated funds (including available contract authorizations), unless otherwise specified herein. [19 F.R. 7481, Nov. 20, 1954]

§ 8.100 *Scope of part* [Section VIII on Termination]. This part establishes for the Departments of the Army, Navy, and Air Force uniform policies relating to the termination of contracts of any Department entered into under the Armed Services Procurement Act of 1947 (hereinafter referred to as "the act"). . . .

§ 8.101. *Applicability of this part.* This part applies to contracts entered into under the act which by their terms provide for termination thereof for the convenience of the Government. Contracts entered into under the act which do not contain a termination clause for the convenience of the Government or which contain a termination clause different from any of the Standard Clauses set forth in Subpart G of this part may be amended to include or substitute a Standard Clause. . . .

§ 8.102 *Effective date of part.* Notwithstanding any earlier effective date prescribed elsewhere in this subchapter, the appropriate Standard Termination Clause set forth in Subpart G of this part shall be inserted, to the extent prescribed in said subpart, in contracts executed as of a date on or after March 1, 1952 or with respect to which procurement is initiated on or after February 1, 1952 and the provisions of this part shall apply to the termination of contracts in which said Standard Termination Clauses are inserted. Use of said Standard Termination Clauses is authorized from the date of issuance.

§ 8.703 *Termination clause for fixed-price construction contracts.* The following standard clause shall be inserted in all fixed-price construction contracts amounting to more than $1,000, except that Contracting Officers may, at their discretion, omit the termination clause from fixed-price construction contracts under $5,000 when the probability of termination for convenience is remote, as in contracts for repair, improvements, or additions to existing structures . . . .

The following statement of authority preceded Section VIII of ASPR in 1957.

AUTHORITY: §§ 8.100 to 8.712-7 issued under R.S. 161; 5 U.S.C. 22. Interpret or apply 62 Stat. 21, sec. 638, 66 Stat. 537; 41 U.S.C. 151-162. [This latter statute was recodified into 10 U.S.C. §§ 2301-14 where it is found today.]

APPENDIX C

Legislative History, Published Commentary and Excerpts from Government Publications

I—Excerpts from legislative history of the Armed Services Procurement Act of 1947.

II—Foreword used with original sections of ASPR.

III—Excerpts from official Government publications showing that Section VIII of ASPR does not have force and effect of law.

IV—Excerpts from legislative history of the Capehart Housing Act.

V—Excerpts from official Government publications showing that the award of anticipatory profits is an expected liability in the event a contract is terminated.

VI—Commentary on case by Commerce Clearing House, *Government Contracts Reporter* ¶ 80,075 (1963).

VII—Excerpts from commentary on case found in 51 GEO. L. J. 842 (1963).

I.

The legislative history of the Armed Services Procurement Act of 1947 states that it:

> "[P]rovides for a return [after World War II] to normal purchasing procedures through the advertising bid method on the part of the armed services. . . . It capitalizes on the lessons learned during wartime purchasing and provdes authority in certain specific and limited categories [where other factors outweigh lower cost], for the negotiation of contracts without advertising. It restates the rules governing advertising and making awards as well as fixing the types of contract that can be made.

S. Rep. No. 571, 80th Cong., 1st Sess., 1948 U.S. Code Cong. & Admin. News 1048-50. And the original drafter of the bill, W. John Kenney, Acting Secretary of the Navy, stated:

The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictates the use of negotiation rather than the rigid limitations of formal advertising, bid and award procedures.

Hearings on H. R. 1366 Before the House Committee on Armed Services, 80th Cong., 1st Sess., Vol. 1, p. 425 (1947).

II.

The early parts of ASPR, but not Section VIII, were issued with the following foreward:

Foreword. The Armed Services Procurement Regulation, hereby issued by the Departments of the Army, Navy, and Air Force, appreciably changes the procurement policies and practices of the three Departments under the First War Powers Act, and provides for new procurement policies and practices, on and after May 19, 1948, under the Armed Services Procurement Act, Public Law 413, 80th Congress.

When the President signed the Armed Services Procurement Act on February 19, 1948, he wrote to the Secretary of Defense as follows:

"The act states the basic policies of the Government with respect to procurement by the Armed Services. It declares that a fair proportion of all procurements shall be placed with small business concerns. It also states that all purchases and contracts for supplies and services shall be made by advertising, except under circumstances specified in the act where exceptions to this general policy may be made.

"This bill grants unprecedented freedom from specific procurement restrictions during peacetime. That freedom is given to permit the flexibility and latitude needed in present day national defense activities. The basic need, however, remains to assure favorable price and adequate service to the Government. To the degree that restrictions have been diminished, therefore, responsibility upon the Defense Establishment has been

increased. There is danger that the natural desire for flexibility and speed in procurement will lead to excessive placement of contracts by negotiation and undue reliance upon large concerns, and this must not occur.

"For these reasons, I am asking you to specify detailed standards to guide your procurement officers concerning the placing of business with small concerns and the circumstances under which they may waive the general policy of advertising for bids. It is of great importance in procurement matters to establish standards and definitions to guide all personnel who have authority to place contracts. Otherwise, differences in interpretation and policies may result in imprudent contracts and give rise to doubts about the wisdom of this new procurement system."

It is believed that the Armed Services Procurement Regulation which is now being issued carries out on a policy level the instructions contained the President's letter. All procurement personnel are enjoined to follow strictly the standards and requirements set forth in this regulation as well as in such implementing procedures as will be issued under it from time to time by each respective Department.

E.g. 13 Fed. Reg. 3074 (1948).

III.

Government officials have consistently recognized that Section VIII is without a statutory foundation.

The Department of the Army, under whose jurisdiction this contract was executed, states the following in its Pamphlet 27-153 entitled *Procurement Law* (1961) at 407:

> *Effectuation of regulations by termination clauses. Since no statute makes the termination regulations in ASPR Section VIII apply to contracts* which do not expressly incorporate them by reference or otherwise, the basic rights of the Government and the contractor upon termination must be found in the terms of the contract itself. The whole termination system established by ASPR Section VIII depends on the use in

contracts of termination clauses provided in it or similar clauses. . . . [Emphasis added.]

Similar conclusions are set forth in the *Navy Contract Law* (1959) as written by the Office of the General Counsel, Department of the Navy. It is stated therein at § 5.29:

> Since no statute makes the termination regulations in ASPR Section VIII apply to contracts which do not expressly incorporate them by reference or otherwise, the basic rights of the Government and the contractor upon termination must be found in the terms of the contract itself. The whole termination system established by ASPR Section VIII depends on the use in contracts of termination clauses provided in it or similar clauses.

In a work entitled *Air Force Procurement: Prices and Profits* (1953), prepared under the direction of the General Counsel, Department of the Air Force, by Professors Robert Braucher and Covington Hardee of the Harvard Law School, the following statement is made at 113:

> The Contract Settlement Act of 1944 applied only to military contracts related to the prosecution of World War II. There is no statute in effect today governing termination procedures. But the ASPR devotes a full and detailed section to setting forth a prescribed method of handling the termination problem. *Since this section has no statutory warrant*, termination pursuant to it seems to depend on the insertion in each contract either initially or by amendment, of the termination article provided for in Section VIII. [Emphasis added.]

In the *Contract Termination Guide* (1954) published by the United States Chamber of Commerce and written by John B. Olverson, former procurement and contract termination specialist, Ordnance Corps, Department of the Army, the following comment is made at 1:

Although the current volume of unsettled claims is small when compared with that existing at the end of World War II, there are factors which make it more complicated. Section VIII of the Armed Services Procurement Regulations (ASPR) is an inadequate substitute for the comprehensive Joint Termination Regulation issued during World War II. *And there is no statute*, such as the Contract Settlement Act of 1944, *prescribing legislative policies on terminations.* Moreover, each of the military services has been permitted to implement Section VIII of ASPR, causing much confusion and lack of uniformity. . . . [Emphasis added.]

IV.

The legislative history of the Capehart Housing Act provides insofar as pertinent:

TITLE VI—MILITARY HOUSING

ARMED SERVICES MORTGAGE INSURANCE PROGRAM

The bill would extend and improve the armed services mortgage insurance program under title VIII of the National Housing Act.

The present program was established by the housing amendments of 1955 as the most practicable means of coping with the very serious housing problem which faced, and is still facing, our military services.

Although the advantages of providing needed military housing directly through use of appropriated funds are generally conceded, it must also be recognized that budgetary considerations would not permit the expenditure in 1 or 2 fiscal years of the sums needed to meet the immediate total need. Accordingly, your committee believes that extension and improvement of the title VIII military housing program is the most practical vehicle for providing a large quantity of military housing quickly through the *utilization of private mortgage capital* to be repaid from quarters allowances of eligible service personnel. [Emphasis added.]

H.R. Rep. No. 2362, 84th Cong., 2d Sess. 37 (1956 U.S. Code Cong. & Admin. News p. 4546).

V.

The Department of the Army clearly recognizes their liability for common law damages when a contract not containing a termination for convenience clause. Its *Procurement Law* (1961) says at 390:

> On the other hand, the Government may be exposed to liability for *common-law damages* for breach of contract, *including anticipatory profits*, unless the Government's right to terminate for its convenience is reserved in the contract. [Emphasis added.]

The General Services Administration, Federal Supply Service, in its *Procurement Handbook* (1959) is to the same effect at 99:

> The considerations entering into termination agreements are so infinitely variable that no hard and fast criteria governing allowable items can be established. Generally speaking, actual bona fide losses sustained by the contractor are compensable, *including anticipated profits*. [Emphasis added.]

A very concise and clear summary of the rule and procurement policy with regard to damages for unauthorized Government terminations is set forth in the *Navy Contract Law* (1959) at §5.6:

> *Damages for Breach of Contract*
>
> While contracting agencies have the authority to terminate their contracts, the exercise of such authority where the contractor is not at fault constitutes a breach of contract as between the Government and the contractor *unless the right to terminate is provided by statute or is reserved in the contract*. When contracting with private parties, the Government has rights and liabilities similar to those of individuals who are parties to such instruments. The Supreme Court has long recognized the right of a government

contra[illegible] *recover common-law damages* when the Government breaches the contract by putting it to an end where the contractor is not at fault. In such cases the primary measure of damages is the amount of the contractor's loss, which may consist of (i) what the contractor already has expended towards performance, less the value of materials on hand, and (ii) the prospective or *anticipated profits* that he would have realized by performing the whole contract. [Emphasis added.]

Section 1-8.201(b) of the Federal Procurement Regulations (which govern all non-military procurement) states in part:

> In the absence of a termination for convenience clause, however, such action [issuance of a termination notice] normally constitutes a breach of contract. Such a breach of contract may subject the Government to liability for common-law damages, *including anticipatory profits*, unless the Government arrives at a voluntary settlement with the contractor. [Emphasis added.]

VI.

Commentary on case by Commerce Clearing House, Inc., *Government Contracts Reporter* ¶ 80,075 (1963).

[¶ 80,075] A Required Clause Is a Part of the Contract—Whether Written In or Not.

CCH Comment.

The Court of Claims has ruled that a standard termination clause—required by ASPR in a fixed-price construction contract[1]—is a part of the contract even though the clause is not written into the signed agreement.[2] This decision spells out a general rule that a contractor can *not* rely on a signed agreement as the complete contract between him and the Government. He must also search the Regulation to make sure that

[1] ASPR 8-703, ¶ 32,950.

[2] *G. L. Christian et al.*, 9 CCF ¶ 71,964, Ct. Cls. No. 56-59.

there are no other clauses which should have been written into the contract.

A Termination For Convenience

The controversy in *Christian* started when the Government terminated a contract for the convenience of the Government upon the cancellation of a housing project. Because there was no termination clause in in the contract, the contractor argued that the government had breached its contract and that he was entitled to damages for the breach—including his anticipated profits. The contractor found ample authority to support his claim to anticipated profits as damages for a *wrongful* termination by the Government.[3]

But the Court of Claims rejected the principles of *Purcell* and *Klein* because of the language in ASPR that a termination for convenience clause "shall be inserted" in all such types of contracts as the one involved in *Christian*. The court found that the Regulation has the force and the effect of law since the Regulation is issued under statutory authority. The court cited the Armed Services Procurement Act of 1947 as the statutory authority for this proposition although that Act is silent as to the issuance of any Regulations thereunder.

Is This a One-Way Street?

If the rule in *Christian* allows the Government to bring such a clau e into a contract, can the contractor do the same thing if the rule works to his advantage? There seems to be some support for this view in *School District 2 Fractional* where the 6th Circuit allowed a purchaser to resell a surplus aircraft under the Regulations rather than under the more restrictive terms of its purchase contract.

But there is authority to the co trary in *Perkins* v. *Lukens Steel* and in *Hartford A. & I. Co.* which clearly state that procurement Regulations are for the benefit of the Government alone. In *Perkins* v. *Lukens* a contractor was not permitted to claim that minimum

[3] *Purcell Envelope Co.*, 110 U.S. 338, CCH GOVERNMENT CONTRACTS REPORTER ¶ 5,400.32; *Klein*, 285 F. 2d. 778, 7 CCF ¶ 71,409.

wages were improperly determined for procurement purposes. In *Hartford A. & I. Co.* a surety who completed a construction contract for a defaulting contractor was held liable for liquidated damages even though the contractor was not so liable under the Regulation.

This issue might seem to require some further clarification by the courts. But if the Regulation has the force and effect of law, as the Court of Claims states, then such mandatory contract clauses should be as available to the contractor as to the Government—even though the written contract does not contain the clauses. See ¶ 7331.

VII.

Excerpts from Commentary on case found in 51 *Georgetown Law Journal* 842 (1963).

This reasoning of the court, constituting as it does a complete departure from prior prevailing law and practices, is deserving of some examination, not only of its conclusions, but its suppositions as well.

* * *

Against this background it would seem clear that in no way can the statutes on which ASPR section 8.703 relies, be read so as to grant powers sufficient to read into the contract a clause not specifically included by the parties. In other words, if a statute directing the insertion of a provision in a contract cannot be said to bind a private contractor to terms not agreed to by him, it would seem that where a regulation alone, without specific statutory authority to include the provision, requires its insertion, the case for binding the contractor to the omitted clause "by operation of law" seems more than suspect.

* * *

"The whole termination system established by ASPR Section VIII *depends on the use in contracts of termination clauses provided in it* or similar clauses." It seems apparent therefore, that prior to the instant decision, except where a wartime termination statute was involved, consent by the contractor was considered

a necessary condition to holding him bound by any contract provision. By ignoring this requirement the net effect of the instant case is to make the instruction of the regulation, rather than agreement of the contractor, the controlling factor in determining what the parties to the contract had intended.

* * *

The effect of this novel approach is the equally unprecedented alteration of the extent of recovery permitted the private party of disallowing any award of anticipatory profits in spite of the absence of a termination clause in the contract.

Underlying the above instances in which the instant court deviated from prior law is the most significant aspect of its decision, namely, the court's use of the syllogistic statement, "As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including 8.703, had the force and effect of law." By so stating the court has reinforced the concept that any regulations issued pursuant to statute, without more, have a binding effect on private parties as great as if the regulation were a statutory command of Congress. The growing backlog of such language, although usually in dicta, has begun to provide a dangerous source of pronouncements which eventually may be called on to substantiate a holding to that effect. Such statements ignore entirely the need at least for an examination of the statutory authority on which such regulations are based, and whether the requirements of the Federal Register Act have been met. In the logical extreme, toward which this decision takes a gigantic step, an internal regulation, circulated only within a particular procurement department, may be found to bind a private contractor to an obligation or liability neither known by the contractor to be involved in the contractual relationship nor included or intended to be included in the contract itself.

At best, a private contractor's duty has been broadened from one of ascertaining the scope of authority of the agent with whom he deals to one of maintaining an intimate knowledge of all departmental regulations

and being bound by them whether he consents or not. What is needed, it is submitted, is an examination into, and a critical evaluation of such concepts as regulations having the "force and effect of law," and the binding effect of regulations on the public at large. Perhaps this decision will dramatize the extent to which these concepts, heretofore assumed without comment or explanation can be carried.

[Emphasis in original. Footnotes omitted.]

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NOV 7 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA

(AMICUS CURIAE ON BEHALF OF PETITIONER)

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(AMICUS CURIAE ON BEHALF OF PETITIONER)

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Pursuant to Rule 42 of the Rules of this Court, Associated General Contractors of America files this brief as an *amicus curiae* with the consent of the parties.

The Associated General Contractors of America, a nonprofit trade association now in its 45th year, is made up of 7,400 of the nation's leading general contractors, many of whom regularly perform prime construction contracts for the U. S. Government. The AGC has traditionally been concerned with relations with the federal procurement agencies and the procurement documents and procedures that are used in connection with these services.

Our first concern is the public interest. If a document, procedure or regulation is ambiguous, unfair or arbitrary, it will in time reduce competition or result in the inclusion in bids of additional costs which the taxpaying public will have to pay. On the other hand, the Government is entitled to and will get ample competition and reasonable prices where the bidding documents and the procedures of the contracting agencies are both fair and equitable. This has been the case through the years in the great majority of dealings with the procurement agencies.

To insure the continuation of this effective working relationship, the AGC maintains advisory committees made up of representative members to consult with federal contracting agencies, such as the Corps of Engineers, Bureau of Yards and Docks, General Services Administration and the Bureau of Reclamation. One of the purposes of these committees is to point out advantages to the Government in eliminating ambiguities or any features of a contract which result in increased cost.

In the subject case, the written agreement entered into by the parties contained no clause permitting the Government to terminate for its convenience. The right of termination is being read into the contract because of the Armed Services Procurement Regulations. However, these Regulations are most voluminous, and they are not readily available to bidders. Moreover, even a lengthy and careful study of these Regulations, and of the court decisions and other rulings thereunder, leaves the question here at issue completely in doubt.

The Associated General Contractors of America thinks this sort of uncertainty is unfair, unreasonable,

and unnecessary. If continued, it will destroy the confidence that bidders have in the provisions of the documents they receive from the Government as their invitations to bid. If the United States Government, in this instance contracting through the Corps of Engineers, wished to have the right of termination for its own convenience, without liability for common law damages, it should have so stated, as it does in other contracts when the right to termination for convenience is desired. This erratic kind of housekeeping by the Government should not be allowed to continue or be encouraged by the courts.

From the standpoint of our national association, speaking for its members and in discharge of our public responsibilities, we feel that liabilities arising out of strained interpretations, and unclear and questionable incorporation in contract documents of departmental regulations, should be denied. The Government should be compelled to state clearly its requirements so that all bidders may know their obligations as well as their rights. From the standpoint of better bidding procedures and clearer understandings, we support the petitioner. The Government wrote the contract, the ambiguity is entirely of its own making, and the reasonable interpretation of the petitioner should prevail.

For the foregoing reasons, the Associated General Contractors of America believes that a writ of certiorari should be issued in this case.

Respectfully submitted,

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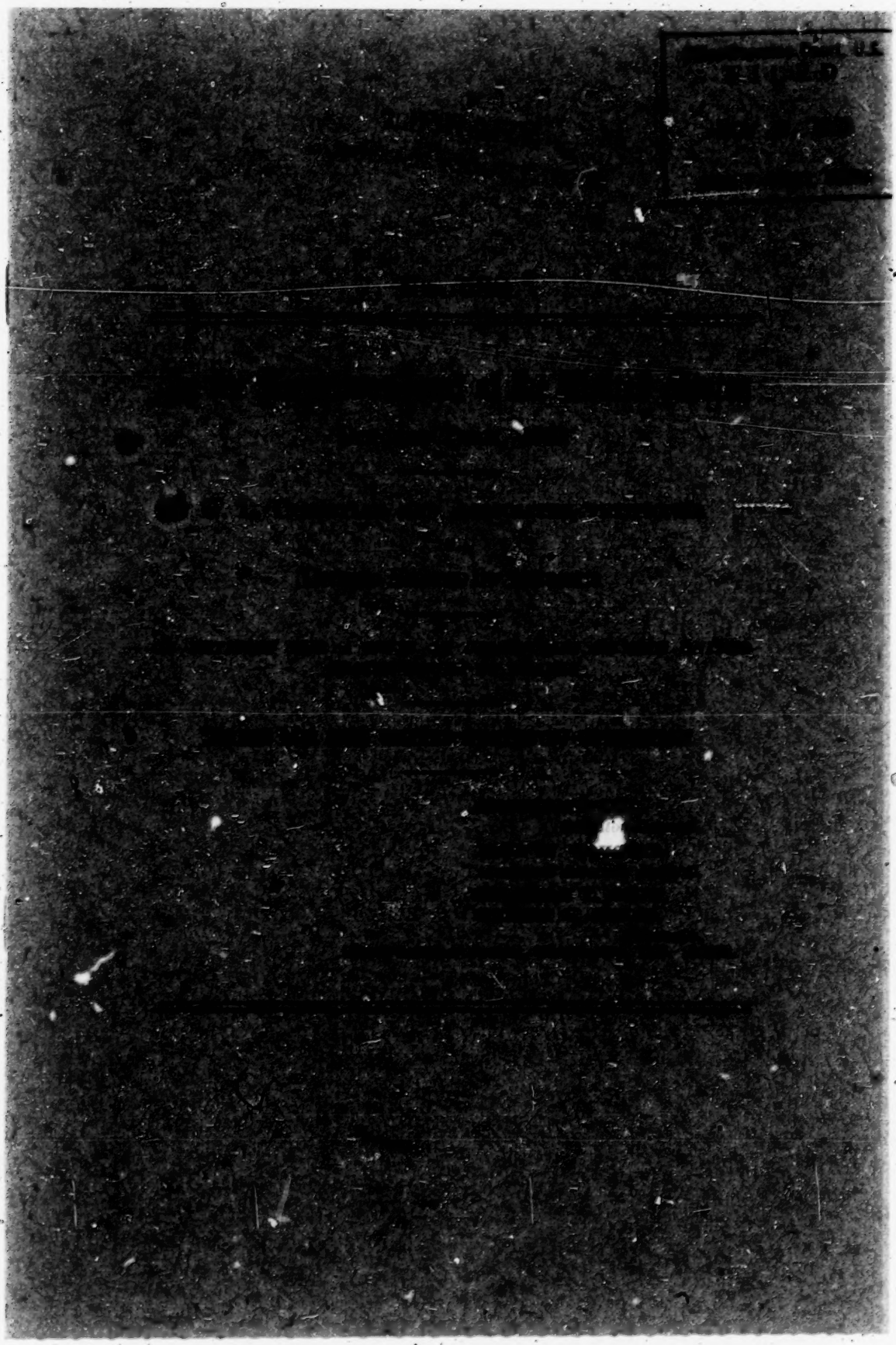

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Claims, which was entered on January 11, 1963 (Pet. App. 2a–20a), is reported at 312 F. 2d 418. The opinion of the Court of Claims on a timely motion for rehearing, entered on July 12, 1963 (Pet. App. 69a–87a), is reported at 320 F. 2d 345.

JURISDICTION

The judgment of the Court of Claims denying petitioner's motion for rehearing and reargument was entered July 12, 1963. The petition for a writ of certiorari was filed on October 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether § 8.703 of the Armed Services Procurement Regulations, which directs that a standard clause permitting termination for the convenience of the government "shall be inserted" in certain fixed-price government construction contracts, incorporates the termination clause into each of the specified contracts by operation of law, whether or not it is included by the parties.

2. Whether § 8.703, if self-operative, is authorized by statute.

3. Whether § 8.703 extends to construction contracts under the Capehart Act, 69 Stat. 646.

REGULATIONS AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent portions of the Armed Services Procurement Regulations (ASPR) are set forth in Appendix B to the petition (Pet. App. 97a–98a). Pertinent excerpts from the construction contract are set forth in the Appendix hereto (p. 13, *infra*).

STATEMENT

This case arises out of the decision made by the Department of the Army in 1958 to deactivate Fort Polk, Louisiana. At the time of this decision, construction had commenced on 2,000 housing units to be used by military personnel at Fort Polk (Pet. App. 21a, 28a–29a, 37a). On February 5, 1958, when work on the project was 2.036 per cent complete, the con-

tractor[1] was notified that the contract, which called for a total price of over $32 million, was terminated for the convenience of the government (Pet. 37a, 42a, 44a). Claims for moneys already expended on the project by the contractor and the sub-contractors, plus the the profit earned thereon, have been either settled administratively (Pet. App. 56a–62a) or adjudicated by the Court of Claims (Pet. App. 63a–68a). At issue here is the Court of Claims' denial of anticipated profits which the contractor and the sub-contractors would have earned on the uncompleted portion of the project had the government not terminated the contract.

The project was being constructed under the Capehart Act (Title VIII of the National Housing Act), 63 Stat. 570, 69 Stat. 651, as amended, 12 U.S.C. 1748–1748g, 1720(f), 42 U.S.C. 1594–1594f, which expired on October 1, 1962, and has not been renewed, 76 Stat. 418, amending 12 U.S.C. 1748b(a). The Capehart Act procedure, more fully described in the Court of Claims' opinion (Pet. App. 13a, n.9), involved construction of the project by a private contractor, who would borrow funds from a

[1] G. L. Christian and Associates, although nominally the contractor and the petitioner here, in fact has no financial interest in the outcome, having in effect assigned its interest in the contract to a joint venture consisting of H. B. Zachry Company and Centex Construction Company, Inc. This joint venture is the real party in interest in this litigation, and all references herein to "petitioner" and "contractor" refer to it. The situation is explained more fully in Part I of the Court of Claims' opinion (Pet. App. 3a–10a).

private financial institution to cover both expenses of construction and his own profit. Until completion of construction, the mortgage taken by the private financial institution would be guaranteed by the Federal Housing Commissioner. Upon completion of the project, the government would assume the mortgage and would service it out of funds appropriated to pay the housing allowances of personnel assigned quarters in the project buildings.

The Housing Contract (Pltf. Ex. No. 8[2]), to which petitioner was a party, did not contain any provision expressly authorizing either party to terminate the contract (Pet. App. 38a). It did, however, obligate the Department of the Army to assume the mortgage upon completion of the project "or upon termination of the Housing Contract for the convenience of the Department prior to completion of the project" (Pltf. Ex. No. 8, paras. 24, 29 (p. 13, *infra*)). Similar references to termination for convenience of the government were contained in the Building Loan Agreement, the Guaranty with Respect to Mortgage Payments, and the Capital Stock Escrow Agreement, all of which were collateral documents executed simultaneously with the Housing Contract.

Petitioner instituted this action in the Court of Claims to recover out-of-pocket losses and anticipated profits. The Court of Claims, in a comprehensive opinion by Judge Davis, rejected petitioner's claim for anticipated profits on the uncompleted portion of the project (Pet. App. 2a–20a). The court concluded that

[2] Plaintiff's Exhibits are contained in the original record in the Court of Claims which has been filed in this Court.

§ 8.703 of the Armed Services Procurement Regulations, 32 C.F.R. § 8.703, which directs that termination-for-convenience-of-the-government clauses "shall be inserted in all fixed-price construction contracts * * *," rendered the standard termination clause applicable to such contracts "by operation of law" (Pet. App. 18a) regardless of the contracting officer's failure to include it. The court based this conclusion on the language of the regulation and the long-standing federal policy against paying anticipated but unearned profits on defense contracts, and particularly on contracts to build military housing (Pet. App. 16a–18a). The court also observed that "termination * * * for the convenience of the Government" was referred to at least four times in the Housing Contract and collateral documents. It concluded that "[t]hese references must have had some meaning" (Pet. App. 18a), and that they must have put petitioner on notice of the government's policy regarding termination. Accordingly, it limited petitioner's recovery to the amount permitted under the clause, which did not authorize recovery for anticipated profits. Rehearing was subsequently denied in an opinion (Pet. App. 69a–87a) rejecting each of petitioner's additional contentions after full discussion.

ARGUMENT

The basic question raised by petitioner is whether § 8.703, which unconditionally requires that a termination clause be inserted in a government contract, may have the self-operative effect of binding both parties to the terms of such a clause whether or not it

is, in fact, inserted in the agreement. Having construed the particular regulation as intended to have that effect and noting the several indications in the language of the Housing Contract and accompanying documents that the parties contemplated termination for the convenience of the government, the Court of Claims correctly concluded that it was "both fitting and legally sound" to apply the standard clause to the agreement of the parties (Pet. App. 18a). Neither this conclusion nor the court's determinations relating to petitioner's subsidiary contentions require further consideration by this Court.

1. The Court of Claims correctly construed § 8.703 as mandatory. The regulation unequivocally prescribed a standard termination clause and authorized the clause's omission *only* if the contract price was under $5,000 and there was no more than a remote possibility of termination for convenience.[3] The specific exception clearly implied that in all other instances a termination-for-convenience clause was required. Moreover, as the court's survey of the history of termination provisions disclosed (Pet. App. 16a–17a), firmly-rooted reasons of policy underlie the regulation, and the draftsman could not have intended to permit *ad hoc* departures from such a consistently recognized principle of public procurement policy. Indeed, the specific procedures prescribed for "deviations" in § 1.109 of the regulations (32 C.F.R.

[3] The exception was in force at the time the present contract was entered into (Pet. App. 97a, 98a). In it's current form, the regulation applies only to contracts in excess of $10,000. 32 C.F.R. § 8.703 (rev. 1961).

§ 1.109) indicate that when such procedures are not followed the prescribed standard clauses ought to apply.

As the Court of Claims observed, "it is important * * * that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials, or by concert of contractor and contracting officer" (Pet. 77a). Consequently, in order to effectuate the policy established by the regulation, the court incorporated the prescribed termination clause into the agreement "by operation of law." This course was consistent with applicable decisions of this Court such as *De Laval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 71–74, and *College Point Boat Corp.* v. *United States*, 267 U.S. 12, in which a right of cancellation granted by statute "became, by implication, one of the terms of the contract." 267 U.S. at 15. The fact that the termination clause in the present case was prescribed by regulation rather than by statute was properly rejected as immaterial. This Court has often held that duly authorized regulations have "the force of law." *E.g.*, *Paul* v. *United States*, 371 U.S. 245, 255; *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534, 542–543.

Petitioner's contention that this incorporation of the prescribed provision into the agreement by operation of law renders unpredictable the extent of obligations under military procurement contracts (Pet. 9–14) is without merit. The regulation which the Court of Claims applied in the present case was pub-

lished in the Federal Register, 18 Fed. Reg. 6430, and in the Code of Federal Regulations, 32 C.F.R. § 8:703 (rev. 1954). It is difficult to believe that a contractor who is responsible for the performance of a 32-million-dollar contract did not have the time or means to consult the applicable regulations published in well-known reference sources. This is particularly true when, as was the case here, the basic contract and accompanying documents make several references to termination for the convenience of the government. Any government contractor is surely aware of the existence of the Armed Services Procurement Regulations and is on notice that his contract may be governed by its applicable provisions. Hence this case involved no claim of surprise, as might arise if a regulation to which contractors had no access were applied to an existing contract. And its result cannot be considered unfair in any sense; the contractor received his profit on the 2 percent of the work which he performed.[4]

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[4] Nor was the Court of Claims' decision inconsistent with *United States* v. *Speed*, 8 Wall. 77, as petitioner contends (Pet. 7–9). *Speed* concerned a regulation of the Secretary of War relating to "contracts for subsistence stores." As did the regulation in the present case, the *Speed* regulation prescribed that all such agreements "shall" provide for their termination at the convenience of the government. The particular contract on which suit was brought failed to contain any such provision. In answer to the government's contention that because of the regulation "the agreement is to be treated as though that provision were in it" (8 Wall. at 83), the Court held that the contract was not "for subsistence stores" so that the regulation was inapplicable. The Court did not question the validity of the government's proposition that an *applicable* regulation should be incorporated into the contract by operation of law.

2. Moreover, the bare question whether a clause prescribed by an applicable regulation should be incorporated into a military procurement contract by operation of law if it is otherwise omitted is not appropriately presented by this case. Since the Housing Contract and other documents referred to termination for the convenience of the government, the Court of Claims held, on rehearing, that the standard clause set out in § 8.703 had been incorporated "by reference" (Pet. App. 75a). In light of the long-standing policy regarding termination of military procurement contracts, which must have been well-known to experienced contractors such as petitioner, this was a reasonable conclusion as to the intent of the parties. And since the case concerned only the construction of § 8.703 in light of well established procurement policy, it is of minimal significance in other cases.[5]

3. Petitioner also contends that if § 8.703 is construed to govern contracts regardless of the parties' failure to include the termination-for-convenience clause set forth in the regulation, it is without statu-

[5] The regulation being, at the very least, a binding instruction to contracting officers, there is little likelihood that the situation presented here will recur. We have been able to find only a single comparable case—*J. W. Bateson Co., Inc.* v. *United States*, Ct. Cl. No. 365-60, issued on the same day as the opinion on rehearing in this case (Pet. 69a). Neither *Homer Electric Ass'n, Inc.*, ASBCA No. 7649, nor *Aero Corp.*, ASBCA No. 8178, which are relied on by petitioner (Pet. 12), concerned contracts as to which the ASPR prescribed termination or "changes" clauses. In *Aero Corp.* the Board of Contract Appeals expressly noted that no mandatory provision was involved and further distinguished the present case because it concerned a construction of § 8.703 only. See ASBCA No. 8178, page 11, note 8.

tory authority (Pet. 16–21). However, there is ample authority for § 8.703 in the broad terms of the Armed Services Procurement Act of 1947, 62 Stat. 21, as amended, 10 U.S.C. 2301 *et seq.*, as well as in the statutes giving the Defense and Service Secretaries power to adopt regulations in their fields of competence, including procurement. 10 U.S.C. 3012, 6011, 8012. See *Priebe & Sons v. United States*, 332 U.S. 407, 413. The fact that none of these statutes refer specifically to termination of contracts for the convenience of the government does not mean that authority to issue regulations with respect to such termination does not exist.

4. Petitioner further contends that Part 8 of the Armed Services Procurement Regulations does not apply to Capehart Act projects. This question is now of limited importance, since the Capehart Act expired on October 1, 1962, and has not been renewed. 76 Stat. 418, amending 12 U.S.C. 1748b(a). Moreover, the decision of the Court of Claims in this regard was clearly correct. The Armed Services Procurement Act was intended to apply generally to military construction contracts; the existence of special legislation such as the Capehart Act, which provided additional authority for a particular type of military construction contract, did not remove that type of contract from the reach of the general provisions of the Procurement Act and the regulations thereunder.[6] And there is no merit to the contention

[6] See Section 1.101 of the ASPR (32 C.F.R. § 1.101), providing that the Procurement Regulations apply generally to procurement of supplies and services under the Procurement Act "or under other statutory authority."

that Capehart Act contracts did not "obligate appropriated funds" within the meaning of the regulatory language defining the scope of the Armed Services Procurement Regulations (Pet. 22–24). The government's obligation to assume the mortgages here involved was clearly set forth in paragraph 29 of the Housing Contract. The initial use of private funds to finance the expenses of construction does not alter the fact that the Housing Contract did "obligate appropriated funds."[7]

5. Petitioner's final contention is that the Court of Claims erroneously limited the subcontractors' rights to those which could be asserted by the prime contractor (Pet. 24–25). But this limitation was imposed by the very terms of the subcontracts, which specifically provided (Pltf. Ex. Nos. 102A–102H) that they "shall be subject to and governed in accordance with the obligation, liabilities and duties imposed by [the Capehart Act] and Housing Contract."

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[7] *Continental Casualty Co.* v. *United States ex rel. Robertson Lumber Co.*, 305 F. 2d 794 (C.A. 8), certiorari denied, 371 U.S. 922, and *United States ex rel. Miles Lumber Co.* v. *Harrison and Grimshaw Const. Co.*, 305 F. 2d 363 (C.A. 10), certiorari denied, 371 U.S. 920, on which petitioner relies (Pet. 23–24), are inapposite. Both cases concern the sufficiency of notice required to support a suit against a surety on a Capehart Act bond. While it was argued in these cases that the use of private funds in Capehart Act projects should distinguish them, for bond requirements, from Miller Act cases, the opinions are addressed to the particular problem of bonds and do not bear on the question whether Capehart Act contracts obligate appropriated funds within the meaning of the Armed Services Procurement Regulations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1963.

APPENDIX

Extracts from plaintiff's Exhibit No. 8, pp. HC–16 to HC–17:

(24) The eligible builder [Christian, Centex-Zachry] simultaneously with the delivery of this Housing Contract shall deposit in escrow with the mortgagee resignations of the officers and directors of each mortgagor-builder, together with certificates, endorsed in blank, representing all of the capital stock of each mortgagor-builder, for delivery to the Department [Department of the Army] upon issuance of the Determination of Completion and the final endorsement of the mortgage note for mortgage insurance by the Commissioner. [Federal Housing Commissioner], *or upon termination of the Housing Contract for the convenience of the Department prior to completion of the project.* The escrow agreement shall be in a form acceptable to the Department and the Commissioner. [Emphasis added.]

* * * * *

(29) The Department shall, to the extent that advances made against each mortgage note (identified in each Building Loan Agreement above referred to) have been approved by the Commissioner, make payments in accordance with the terms of said note, provided that this obligation to make payments shall not become effective until the Commissioner shall have finally endorsed said note for mortgage insurance, *or upon termination of the Housing Contract for the convenience of the Department prior to completion of the project.* * * * [Emphasis added.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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Exhibit A: Awards by Type of Contractor (July-June).

Exhibit B: Awards to Small and Other Business Firms.

CITATIONS

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No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE OF THE ELECTRONIC INDUSTRIES ASSOCIATION

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Electronic Industries Association, acting in behalf of its Government Products Division, respectfully files this brief *amicus curiae* in support of the Petition for Certiorari filed in behalf of G. L. Christian and Associates in the instant case. Both counsel for Petitioner, G. L. Christian and Associates and counsel for Respondent, United States of America have given their consent to the filing of this brief.

The Electronic Industries Association (herein referred to as EIA) is composed of approximately 300 member companies engaged in the manufacture of electronic equipment and components. It is the national association representing the fifth largest manufacturing industry in the United States, with gross annual sales in excess of $10 billion. The vast majority of its members deal with the Department of Defense as prime contractors, subcontractors, or both. Also, each company, acting as a prime contractor for a major weapons system or large projects, awards literally thousands of subcontracts, to which many provisions of the Armed Services Procurement Regulation are applicable. Therefore, as representatives of members which engage in more than $5 billion of prime and subcontracts with the military departments each year, EIA is concerned over the far-reaching impact the Court of Claims' decision could have on future procurement of electronic equipment and parts to meet our nation's needs for national security.

The Issue

The specific issue is whether Section VIII of the Armed Services Procurement Regulation was issued under statutory authority and has the full force and effect of law and if so, whether its provisions can be made part of a contract even though such inclusion was not agreed upon by both parties at the time of the contract. The broader issue is whether contract rights and obligations not included in a contract can be created between the Government and a contractor solely on the basis of an administrative regulation which has no specific statutory support.

1. Section VIII of ASPR Is Not Supported by Statutory Authority

This Association views the far-reaching effect of the decision below as creating an extremely dangerous and chaotic situation in the increasingly complex field of government contract law and, for this reason, strongly believes it should be reviewed and clarified..

The decision would open the door to the creation of contract rights and obligations by administrative regulation without any specific statutory support. Furthermore, it purports to give full force and effect of law to an entire series of procurement rules, only a portion of which are related to procurement and hence can be considered as properly implementing the Armed Services Procurement Act.

The Court of Claims has ruled that Section VIII of ASPR, prescribing the procedures and policies for the termination of contracts is based upon the authority of the Armed Services Procurement Act. No one would dispute the right of the Government to terminate or breach a contract made by it. This right exists as an incident of sovereignty. But what is involved here relates to the rights of the parties in determining damages arising out of a contract terminated by the Government. The court below has taken the position that these damages can be based upon an administrative regulation which was not implemented by the inclusion of a clause in the contract in question fixing the rights of the parties. And this, the lower court rules, is the controlling law because the Department of Defense has the authority to prescribe these rights under the Armed Services Procurement Act, which contains no statutory policies relating to the

settlement of damages in the event of a breach by the Government.

Petitioner's argument for certiorari recites several authorities in support of the point that the Armed Services Procurement Act has never been considered authority for prescribing the rights of parties to damages under defense contracts breached for the convenience of the Government. We know of no authority who has taken the opposite point of view. This general subject was discussed in "A Symposium on Contract Termination" in the July-September, 1954 issue of the *Federal Bar Journal*. On page 232, the author states:

> It would seem, therefore, that the validity of Section VIII of the Armed Services Procurement Regulation, the regulation applicable to all terminated defense contracts, is open to question insofar as it attempts to prescribe a basis for settlement not specifically covered by contract. *The argument that the Termination Regulation has statutory support in the Armed Services Procurement Act of 1947 is valid only to the extent of prescribing procurement procedures and policies having no relationship to contract rights and obligations.* Any attempt *via* substantive rulemaking to prescribe terms and conditions of settlement *not expressly agreed upon* should be based upon statute setting forth a comprehensible legislative standard circumscribing the allowable area of administrative judgment and properly delegating authority to implement the standard within the prescribed discretion. The legal framework, therefore, for settling terminated contracts at present would seem to be limited to the express provisions of the Termination Clause and the portions of the regulations which have been specifically incorporated by reference. (Emphasis added.)

Thus, there is a general consensus among the authorities who have given serious consideration to this question that whatever statutory support may exist for Section VIII of ASPR in the Armed Services Procurement Act, its validity cannot extend beyond terms and conditions expressly agreed upon by the parties and included in the contract. If the dignity of a contract is to be preserved and public confidence in our Government retained, it is extremely important that the principle of mutuality of obligation be kept—even in contracts to which the United States Government as a sovereign is a party.

Similar references to the lack of statutory authority to terminate contracts are found in various manuals of the branches of the Defense Department and in the Code of Federal Regulations. This Code (41 C.F.R. § 1-8.201(b), 1963) provides in part: "Thus, the contractual right to terminate a contract for the convenience of the Government and to make a settlement agreement . . . is based on such a clause. However, the power of a contracting activity to issue a termination notice does not depend on the existence of a termination for convenience clause in the contract. In the absence of a termination for convenience clause, however, such action normally constitutes a breach of contract."

Section VIII of ASPR was not issued until January 1952, but only after efforts to obtain peacetime termination legislation failed. Although the Armed Services Procurement Act was enacted in 1947, efforts continued until 1952 to secure passage of a contract settlement law.

Even assuming *arguendo* that ASPR Section VIII contains statutory authority, it does not resolve the

basic question of contract law that to be binding, it must be implemented *via* the inclusion of appropriate contract provisions. In this connection, the Georgetown Law Journal is quoted:

> Arguably, it would seem that statutes requiring the insertion of contract clauses would present the strongest case for binding the contractor to the terms of the statute by reading the clause into the contract. However, since such statutes have been construed as binding only on the contracting official to find that the regulations issued pursuant to such statutes bind a private contractor would be granting them greater "force and effect" than the enactment itself. This would seem especially anomalous in the existent case where the regulation involved is founded not on statutes requiring termination provisions, but only on the general power of department heads to issue regulations on the conduct of departmental activities. (51 *Geo. L.J.* 847, 1963); (cf. 40 *Comp. Gen.* 565, 1961; 20 *Comp. Gen.* 931, 1941; 20 *Comp. Gen.* 890, 1941; 41 CFR § 1-8.201(b), 1963.)

The Comptroller General stated this same general principle in a decision involving the omission from a contract of a provision required by the Eight Hour Laws of 1912. He held it inconceivable,

> . . . that the Act is automatically binding upon a contractor under a contract which does not contain its provisions. (20 *Comp. Gen.* 890, 1941)

It would therefore seem that the decision below was erroneous on two counts: (1) in holding that statutory authority existed for Section VIII of ASPR and (2) that such a provision could be made binding upon a contractor who had not agreed to its incorporation within a contract.

It should not be overlooked also that the Defense Department is not required to comply with Section 4 of the *Administrative Procedure Act*, which requires that proposed regulations be published in the Federal Register and an opportunity be extended to the public to comment thereon prior to final rulemaking. This practice has been generally accepted as part of administrative due process in the promulgation of substantive regulations. But in this case, we have an unusual situation in that not only is a contractor made subject to rights and obligations not included in his contract, but he is also subject to a regulation purportedly having the force and effect of law and which was promulgated without according him the opportunity to support or oppose it under the rulemaking procedures required by Section 4 of the *Administrative Procedure Act*.

Moreover, if the decision below is permitted to stand, it can readily be interpreted as effectuating a complete delegation of legislative power to the Defense Department for the development of contract policies and procedures in all areas related to military procurement. Thus, the Defense Department could prescribe so-called procurement policies dealing with broad areas seeking economic and social ends, including problems involving labor-management relations. If the Armed Services Procurement Act authorizes substantive law-making in the settlement of contract rights not made part of a contract, it can be argued that it authorizes such law-making for other areas related to procurement but not specifically covered by that Act. Thus, the decision below raises the very serious question: What are the statutory limits on the exercise of

administrative rule making under the Armed Services Procurement Act?

Where no clause has been included to establish otherwise the basis for determining damages under a contract terminated at the Government's convenience, it is accepted law that the contractor is entitled to common law damages. *United States* v. *Speed*, 75 U.S. 77 (1868). Otherwise, the contractor would be deprived of his property without due process of law.

Because contract rights and obligations are involved, they should not be destroyed by administrative edict, especially where there is no statutory authority clearly establishing a legislative policy in the procurement area involved. Certainly, contract rights and obligations should not be allowed to be created solely by an administrative regulation not implementing a specific statutory policy and under circumstances in which such rights were not spelled out in a contract.

To carry this concept further, every contract between defense prime contractors and the thousands of subcontractors also would be subject to the automatic inclusion of contract clauses prescribed by administrative regulation. This results in a situation in which the contract rights and obligations between private parties are fixed by administrative rule, rather than by specific statutory authority or by appropriate clauses included in a contract. This is not rule by law. We submit that contract rights and obligations not included in the provisions of a contract should never be considered as part of such contract unless properly implementing a statute specifically dealing with the subject matter relating to such rights and obligations and made mandatory, whether included or not in the contract.

2. The Court of Claims Decision, If Allowed to Stand, Will Have An Adverse Effect on Future Government-Industry Contract Relations

The Federal Government awarded $29,378,720,000 in military procurement contracts between July 1962 and June 1963. During this period, $4,301,101,000 of the total amount went to small business firms. (Exhibit A). These dollar figures represent 8,058,560 contract actions which include awards, amendments, terminations, or other changes in a prime contract), 5,638,116 of which concerned small business firms. (Exhibit B). These staggering amounts of dollar figures and contract actions indicate the magnitude of the military procurement program and the number of times which the Armed Services Procurement Regulation and the implementing regulations of the various military services come into play. The decision below has cast a heavy shadow of doubt and uncertainty over this entire field of contracting. No longer would it be possible to define the rights of the parties to a military procurement contract. The mutual agreement of the parties and their written memorandum of that agreement no longer will suffice if the decision in the instant case is upheld.

The especially harmful effect of the decision below upon the small entrepreneur, either as contractor or subcontractor, is readily foreseeable. The parties are no longer governed by a contractural agreement but rather by the whole of ASPR. Additionally, Section 1.108 of ASPR gives the military departments and subordinate organizations thereof power to issue their own implementing regulations, the issuance of which is not subject to the administrative due process pro-

cedures provided in Section 4 of the *Administrative Procedure Act* (5 U.S.C. Sec. 4).

Without a legal staff to interpret these ever-changing regulations, and in many instances with no notice of, or access to, the regulations themselves, the small contractor or subcontractor is at an insurmountable disadvantage. The larger contractor is similarly without a means of determining what "regulations" may later be read into his contract and said to have "statutory authority" and the "force and effect of law." The adverse effect of this situation is widely recognized throughout the membership of the Electronic Industries Association and indeed throughout the entire government contracting community. A quote from *The Government Contractor*, published by Federal Publications, Inc. (5 Govt. Cont. ¶57, 1963) is illustrative. In commenting on the *Christian* decision below, it states:

> Moreover, from a practical standpoint, the burden which the instant decision imposes on contractors might well prove to be intolerable. If carried to its possible extreme, for example, the decision could require a prospective contractor to search not only the entire ASPR, but the implementing regs of the particular military service with which he is contracting (AFPI, APP or NPD) in order to determine exactly what his contractual obligation may be—even though the *contract itself* contains *no references* to any portions of those regs. Such a task might involve "hairline" determinations by contractor as to whether particular provisions of the regs are—or are not—applicable to his contract. Illustrative of this is the instant case itself, wherein it was certainly not free from doubt that ASPR applied to Capehart contracts . . . (Emphasis added).

The confusion caused by the decision below is added when one considers whether the rule laid down therein is available for the use of either party. In *School District 2 Practional* v. *United States*, 229 F. 2d 68 (6th Cir. 1956), there seems to be some authority for so holding.

One of the most incisive comments on the decision below, further confirming its harmful effects, is to be found in the *Georgetown Law Journal* (51 Geo. L.J. 842, 1963) at page 850:

> Underlying the above instances in which the instant court deviated from prior law is the most significant aspect of its decision, namely, the court's use of the syllogistic statement, "As the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including 8.703, had the force and effect of law." By so stating, the court has reinforced the concept that any regulations issued pursuant to statute, without more have a binding effect on private parties as great as if the regulation were a statutory command of Congress. The growing backlog of such language, although usually in dicta, has begun to provide a dangerous source of pronouncements which eventually may be called on to substantiate a holding to that effect. Such statements ignore entirely the need at least for an examination of the statutory authority on which such regulations are based, and whether the requirements of the Federal Register Act have been met. In the logical extreme, toward which this decision takes a gigantic step, an internal regulation, circulated only within a particular procurement department, may be found to bind a private contractor to an obligation or liability neither known by the contractor to be involved in the contractual relationship nor included or intended to be included in the contract itself.

CONCLUSION

The Electronic Industries Association believes that the decision of the Court below is not legally sound, and if permitted to stand, will create confusion and uncertainty in this increasingly complex field of Government contract law. Therefore, we respectfully support the petition for certiorari made herein and urge that it be granted.

Respectfully submitted,

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EXHIBIT A

MILITARY PRIME CONTRACT AWARDS
AND
SUBCONTRACT PAYMENTS
July 1962—June 1963
OFFICE OF THE SECRETARY OF DEFENSE

TABLE I

AWARDS BY TYPE OF CONTRACTOR (JULY - JUNE) a/

(Amounts in Thousands)

Type of Contractor	July 1961 - June 1962					July 1962 - June 1963					
	Total	Army	Navy	Air Force	Defense Supply Agency b/	Total	Army	Navy	Air Force	Defense Supply Agency	Other Defense Agencies
TOTAL	$29,254,502	$7,155,735	$8,766,618	$11,769,112	$1,563,037	$29,370,720	$6,364,736	$8,235,200	$11,918,441	$2,670,344	$189,999
Actions of Less Than $10,000	2,932,362	1,041,855	883,441	813,234	193,832	3,043,729	847,305	660,733	837,960	472,731	c/
Actions of $10,000 or More	26,322,140	6,113,880	7,882,677	10,955,878	1,369,205	26,326,991	5,517,431	7,574,467	11,080,481	2,197,613	189,999
INTRAGOVERNMENTAL	1,455,481	408,910	216,043	472,165	61,363	346,516	77,631	102,389	144,999	16,636	4,951
Actions of Less Than $10,000	613,256	241,831	101,861	242,027	21,437	206,107	56,367	32,906	113,228	3,636	c/
Actions of $10,000 or More	842,225	169,079	114,082	229,138	39,926	140,409	21,264	69,483	31,771	13,020	4,951
FOR WORK OUTSIDE U. S.	1,434,099	679,918	402,519	75,423	6,239	1,276,839	520,013	152,226	268,581	32,436	2,583
Actions of Less Than $10,000	192,846	122,794	23,414	46,327	311	184,492	109,922	36,785	36,779	1,006	c/
Actions of $10,000 or More	1,241,249	557,124	379,101	29,096	5,928	1,092,347	410,091	115,441	231,802	326,430	2,583
EDUCATIONAL & NON-PROFIT INSTITUTIONS	497,483	93,471	147,439	254,580	53	617,846	85,840	176,918	316,161	278	38,651
Actions of Less Than $10,000	9,344	3,843	905	4,688	40	43,260	4,618	3,925	6,641	86	c/
Actions of $10,000 or More	487,929	89,628	146,476	249,892	13	604,586	81,230	174,993	309,520	192	38,651
BUSINESS FIRMS FOR WORK IN THE U. S. (SUB-TOTAL)	28,247,403	6,403,491	8,600,621	10,738,024	1,005,832	27,143,517	5,661,244	7,803,755	11,186,790	2,326,004	143,814
Actions of Less Than $10,000	2,116,726	672,912	751,603	520,192	166,019	2,684,870	676,312	792,127	676,312	468,033	c/
Actions of $10,000 or More	26,130,737	5,730,579	7,849,018	10,217,832	839,813	24,533,647	5,004,846	7,014,628	10,512,388	1,857,971	143,814
Small Business Firms	4,622,049	1,701,572	1,370,549	1,025,550	424,608	4,301,101	1,181,178	1,132,964	971,988	943,020	9,956
Actions of Less Than $10,000	1,368,006	465,531	409,653	311,231	181,591	1,398,970	357,789	429,859	320,362	284,960	c/
Actions of $10,000 or More	3,254,043	1,237,041	960,896	714,319	242,992	2,902,131	823,389	703,105	651,626	658,060	9,956
Other Business Firms	22,525,354	4,842,004	6,638,082	9,712,474	580,774	22,842,416	4,500,066	6,670,800	10,210,732	1,382,984	137,828
Actions of Less Than $10,000	748,720	209,381	287,950	208,961	43,428	1,285,900	318,523	359,268	349,932	183,071	c/
Actions of $10,000 or More	20,776,634	4,632,623	6,342,132	9,504,413	497,446	21,631,516	4,181,543	6,251,532	9,860,800	1,199,913	137,828
SMALL BUSINESS PERCENT OF BUSINESS FIRMS	17.7%	27.1%	17.1%	9.6%	46.3%	15.8% d/	20.8%	16.3%	8.7%	40.5%	4.2%
Actions of Less Than $10,000	64.6	68.9	62.0	60.0	73.9	55.6	52.9	54.5	48.5	60.9	c/
Actions of $10,000 or More	13.0	22.6	12.4	7.0	40.7	11.8	16.5	10.9	6.2	35.4	4.2

a/ For definitions and coverage, see Notes on Coverage.

b/ Includes awards since 1 January 1962, when procurement responsibility for cert in common supplies was transferred from the military departments.

c/ An insignificant amount is included with actions of $10,000 or more.

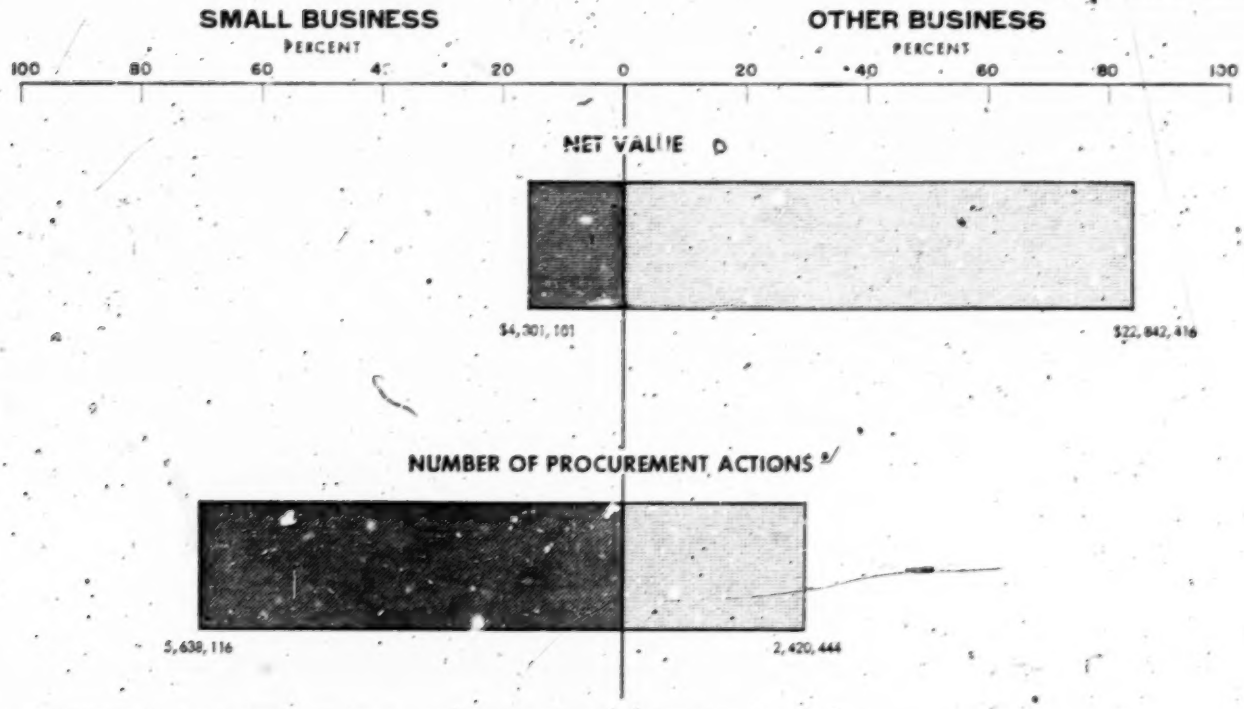
d/ Not comparable with fiscal year 1962 because of a change in reporting coverage. If reported on a comparable basis, the ratio would be 16.9 percent

CHART I

AWARDS TO SMALL AND OTHER BUSINESS FIRMS

JULY 1962 - JUNE 1963

MILITARY PRIME CONTRACT AWARDS
AND
SUBCONTRACT PAYMENTS
July 1962—June 1963
OFFICE OF THE SECRETARY OF DEFENSE



a/ AN ACTION MAY AWARD, AMEND, TERMINATE, OR OTHERWISE CHANGE A PRIME CONTRACT.

EXHIBIT B

Office-Supreme Court, U.S.
FILED
NOV 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For a Writ of Certiorari to the United States Court of Claims

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For a Writ of Certiorari to the United States Court of Claims

---

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Counsel for petitioner in the above entitled case received the brief for the United States in opposition to the petition for a writ of certiorari on November 12, 1963. That brief, touching as it does only the surface of the problem, fails to reach the depth of the issue or to consider the magnitude of the problem which is presented to the Supreme Court for resolution. Ac-

cordingly, petitioner respectfully submits this reply, hoping both to set forth the real scope of the problem and also to note recent relevant developments which have come to petitioner's attention since the filing of its petition.

THE ISSUE PRESENTED FOR REVIEW

The Government's statement to the contrary, the basic issue here presented is one of precedence. Does a contract form which is drafted pursuant to specific statutory authority by the Federal Housing Commissioner and the Assistant Secretary of Defense for Properties and Installations become, upon adoption and signing by the parties, a solemn contractual document which is the sole source of their mutual rights and obligations? Or, on the other hand, does the contract contain as a matter of law a clause required by a regulation, which was promulgated by the Secretary of Defense for internal departmental management, even though that clause was deliberately omitted from the contract form? Included in this problem are the subsidiary questions: whether the Secretary of Defense has the power to enter into a contract which does not contain all the clauses contained in the hundreds of pages of the Armed Services Procurement Regulation (and the various implementing regulations) which he himself promulgated for the internal management of the department; and whether automatic incorporation of a regulation into a contract can be accomplished just by using the phrase "force and effect of law."

In short, the whole area of Government contracts is at a crossroads. Do we have procurement by contract or procurement by regulation? The former has been

the preference of this country since its early beginnings; the latter will be the result if the decision of the Court of Claims is not reversed. Recognition of the possibility of this latter result is shown by the recent article published in the October 1963 issue of the George Washington University Law Review entitled, "Contract By Regulation" (Appendix, *infra*, p. 1a) and by an article in the Navy General Counsel's Newsletter dated February 1, 1963 entitled, "ASPR Becomes A Clause Handbook" (Appendix, *infra*, p. 2a).

IN REPLY

1. In the first argument the Government has assumed the point in dispute. Never has this Court incorporated a regulatory clause into a contract and the decisions of this Court in *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 71-74 (1931) and *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925) do not so hold. Rather, they held that Congress could by statute give a right to cancel a contract and that this right of cancellation became part of the contract. There is no such statute in existence now and what the Government in its answer and the court below have said is that a regulation having the "force and effect of law" carries the same power.

Certainly, there is no statutory basis for reading a termination article into the contract and the Assistant Secretary of Defense did not violate a Congressional mandate when he and the Federal Housing Commissioner omitted the termination article. Congress has *refused* to enact a peacetime replacement for the Contract Settlement Act of 1944 and the Act of June 15, 1917 (relied on in the *De Laval* and *College Point Boat* cases) which at one time did permit the action

which is subject to attack here. Finally, even the regulation in issue shows that the only course open to the contracting officer when the termination article was omitted was to try to amend the contract to include such a clause. See sec. 8.101 of ASPR on page 98a of Appendix B in the petition.

The Government seeks to support the radical conclusion of the court below by saying that the insertion of clauses permitting termination for the convenience of the Government is a "recognized principle of public procurement policy" and that "'procurement policies set by higher authority [should] not be avoided or evaded (deliberately or negligently) by lesser officials . . .'" However, this position is erroneous in both respects. For over a century, this Court has followed the rule of allowing anticipatory profits as part of the damages the Government must pay for unjustified termination of a contract unless limited by contract provision or statutes; and those claims under this contract which were completely settled were done so on the basis of allowing anticipatory profits. Furthermore, the official legal and procurement handbooks of the Government agencies specifically acknowledge this liability and excerpts from these publications are found on pages 104a-105a of Appendix C in the petition.

With regard to the second point concerning the avoiding of policies set by higher authority, can the Government honestly suggest that the Assistant Secretary of Defense for Properties and Installations and the Federal Housing Commissioner are "lesser officials" incapable of approving a contract which does not follow exactly the form set forth in regulations promulgated for internal departmental management and the guidance of contracting officers?

This Court has held that one who seeks to avail himself of a regulatory remedy must comply with the conditions set forth in those regulations and found in the Federal Register. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). Here, however, petitioner is not seeking regulatory relief. It is seeking accepted common law damages for breach of a contract drawn up by authorized Government officials.

2. In the second part of its argument, the Government is seeking to support its position on the issue of incorporation by law by saying the termination article was actually incorporated by reference. At two specific points in the contract, as well as in supporting documents dealing with the mortgage loan, there are indeed references to a termination by the Government and these were for the benefit of the private lenders who financed the Capehart project. In a project such as this, the Government agrees to take over the loan when the project is completed. Because, however, the private lenders knew that the contract might be terminated by the Government even though there was no termination article (see *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 532 (1961) (Dixon-Yates contract)) or that the contract might later be amended to include a termination article (see sec. 8.101 of ASPR, 32 C.F.R., 1954 rev.), they insisted upon references to the Government's termination for convenience in these documents. The Government guarantee was not effective until the housing construction was complete, therefore, the private lenders insisted upon a provision that would make the Government guarantee effective, to the extent of the funds they advanced, if the Government should ever elect to terminate the housing contract for its convenience. (Plaintiff's Ex-

hibit No. 6, Brief in Support of Plaintiff's Motion for Rehearing and Reargument.)

Thus, though the *right to terminate* was deliberately omitted from the contract, there are references to such a termination in the contract documents to take care of the situation where the Government exercised its *power* to terminate or breach. The Government cannot say that this means the right to terminate was included in the contract.

3. The matters dealt with in the third part of respondent's arguments are well covered in the fourth reason for granting the writ found on pages 16-21 of the petition. Section VIII of ASPR was not then and is not now issued pursuant to 10 U.S.C. secs. 3012, 6011 and 8012 (1958); Section VIII was promulgated long before these statutes were enacted. Rather, Section VIII was issued under the authority of the office housekeeping statute (5 U.S.C. sec. 22 (1958)) and interprets the Armed Services Procurement Act of 1947—a statute of limited purpose which cannot be said to contain broad terms dealing with procurement generally. Congress has refused to enact a bill dealing with termination of Government contracts even though there was such a law in effect at the end of World War II. The result is that Section VIII of ASPR has no statutory foundation and the official procurement law publications of the Army, Navy and Air Force have for years expressly so stated. All three state unequivocally that a termination article is without statutory foundation and must be included in the contract to be operative. See pages 101a-103a of Appendix C in the petition.

4. The Government here says that the issue of whether the Armed Services Procurement Regulation

applies to Capehart Act projects is no longer important. The decision below squarely presents the question of whether a statute dealing with a specific subject that affects two instrumentalities of the Government, namely, the Department of Defense and the Federal Housing Administration is restricted in application by such a limited purpose statute as the Armed Services Procurement Act of 1947 which clearly only applies to one of such two instrumentalities. The issue as to the breadth of application of the Armed Services Procurement Act of 1947 is still most important to this country's vital multi-billion dollar military procurement program.

5. The subcontracts do not limit the rights of the subcontractors, as contended by the Government, with regard to recovery for unauthorized termination by the prime contractor. If ASPR applies as a matter of law to the subcontracts, which is denied by the petitioner, a convenience termination article is still not a part of the subcontracts. Unlike the wording of ASPR 8-703, ASPR 8-706, setting forth a convenience termination article which may be used in a subcontract, is not a mandatory provision and does not require the use of that article. Therefore, by no stretch of the imagination can the convenience termination article be said to be a part of the subcontracts as a matter of law. The decision below completely changes the previously-accepted position of subcontractors in Government contracting. The rights of subcontractors, being most important to the defense program and the economy of the country, can only be clarified by a determination of the Supreme Court.

CONCLUSION

For the foregoing reasons, the arguments of respondent should be rejected and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

The following is the first page of a seven page commentary found in Cibinic, *Contract by Regulation*, 32 GEO. WASH. L. REV. 111 (1963):

CONTRACT BY REGULATION

*John Cibinic, Jr.**

Although the courts often have stated that the United States is bound by commercial rules of law when it enters into a contract,[1] it is well recognized that many special advantages are given the government at the expense of the party with whom it deals.[2] These advantages often result in a government contractor getting less profit than he thought he had bargained for.

In a recent decision,[3] the Court of Claims added another of these special advantages when it held that a contract clause required to be included in a government contract by the Armed Services Procurement Regulation (hereinafter referred to as ASPR) would be read into the contract even though it was not reproduced or incorporated by reference therein.

Christian[3a] involved a construction contract which was terminated for the convenience of the government when the project was cancelled. The contractor, basing his claim on a line of government contract cases[4] as well as on commer-

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* Assistant Professor, the Graduate School of Public Law, The George Washington University.

[1] Lynch v. United States, 292 U.S. 571 (1934); United States v. Purcell Envelope Co., 249 U.S. 313 (1919); The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1869).

[2] See United States Navy Department (Office of General Counsel), Preface to Navy Contract Law (2d ed. 1959).

[3] G. L. Christian & Associates v. United States, 312 F. 2d 418 (Ct. Cl. 1963), motion for rehearing and reargument denied, Ct. Cl. No. 56-59, July 12, 1963.

[4] United States v. Purcell Envelope Co., supra note 1; United States v. Behan, 110 U.S. 338 (1884).

cial law principles, attempted to collect anticipated profits which would have been earned had the contract been completed. The claim was denied on the basis that anticipated profits were payable only where there was a breach. Since the government had reserved the right to terminate, there was no breach. The fact that the right to terminate was not included in the contract did not deter the court. It held that a clause containing such a right was required by a regulation which had the force of law and, therefore, would be read into the contract by the court.

A further examination of this holding appears worthwhile, in view of the history of its development and the size and nature of Department of Defense procurement regulations. This article will deal primarily with the ASPR, which is the principal regulation governing defense procurement.

The opening paragraphs of an article found in the *OGC Newsletter*, Office of the General Counsel, Department of the Navy, Vol. 9, No. 1, Feb. 1963, pp. 17-19 is reproduced below.

ASPR BECOMES A CLAUSE HANDBOOK?

G. L. Christian and Associates v. *U. S.*, Ct. Cl. , No. 56-59, Jan. 11, 1963

For years Government procurement lawyers have discussed having a clause book of "boiler-plate", portions of which would be incorporated by reference in contracts.

Now the Court of Claims has rendered a decision which may go far toward achieving this end. If a contract governed by ASPR fails to include a mandatory clause, the court will determine the rights of the parties as if the clause had been included.

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[5] Restatement, Contracts § 329 (1932).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of December 16, 1963, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case as prayed for in the petition filed October 10, 1963, herein.

Petitioner maintains that the Court of Claims erred in holding that the "Termination for Convenience" clause specified in the Armed Services Procurement Regulation restricted the amount of damages which the petitioner and its subcontractors could recover for the Government's termination of a contract. The contract did not contain a "Termination for Convenience" clause and had been approved by the Secretary of Defense's designee pursuant to a statute which specifically authorized him to prepare such a contract form.

QUESTION PRESENTED

Did the petitioner's contract include, as a matter of law, a "Termination for Convenience" clause as set forth in section 8-703 of the Armed Services Procurement Regulation, even though the parties deliberately omitted such clause from the contract form and that form had been approved by the Secretary of Defense as provided by statute?

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Conflict of Decisions Has Recently Developed

At the time of filing its petition herein, petitioner failed to point out that, notwithstanding the great impact that the erroneous decision below would have on this country's multibillion dollar national defense procurement program, litigation in the circuit courts with a resulting conflict of decisions was improbable because of the concentration of Government contract actions in the Court of Claims. Contract claims against the Government in excess of $10,000 must be asserted in the Court of Claims. 28 U.S.C. 1346(a)(2). Because of the amounts usually involved in Government contract cases, almost all contract actions against the Government are filed in the Court of Claims.

This situation is very similar to the third example of when this Court might grant a Motion for Rehearing set forth in this Court's Rule 58(b). *Schgiber-Shroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50 (1938), cited in that rule, is an example of a valid reason for granting a rehearing. After a denial of a petition for a writ of certiorari, the petitioner's request for rehearing was granted upon a showing that such patent litigation was so concentrated in a single

circuit that there was no possibility of securing the conflict of decisions usually necessary for a review by this Court. Since Government contract actions are, for the reasons explained above, so heavily concentrated in the Court of Claims, a showing of conflict of decisions is almost impossible. In recent decades such a conflict in substantive Government contract law has seldom developed. Yet, Government contracts are now one of the most vital factors in our national economic life.

Furthermore, the Court of Claims is, in light of the very few Government contract cases reviewed by this Court, the court of first and last resort available to most Government contractors; its decisions are not reviewed by a circuit court of appeals. This unusual feature was just recently highlighted by Mr. Frederick Bernays Wiener in the December 1963 issue of the *American Bar Association Journal* (49 A.B.A.J. 1172):

> Nowadays in all but very exceptional cases the Court of Claims is both a court of first instance as well as a tribunal of last resort. This is not an entirely healthy situation . . . .

This Court has, therefore, a heavier responsibility to review Court of Claims decisions on government contract matters than cases which have originated in federal district courts and have received the substantial benefit of a review by a circuit court of appeals.

The need for this Court to review decisions of the Court of Claims is evident from the fact that during the past 20 years this Court has not by majority decision affirmed a single Court of Claims case involving a Government contract issue. On the other hand it has reversed the Court of Claims in the following seventeen

Government contract cases: *United States* v. *Bianchi*, 373 U.S. 709 (1963); *Mississippi Valley Generating Co.* v. *United States*, 364 U.S. 520 (1961); *Armstrong* v. *United States*, 364 U.S. 40 (1960); *United States* v. *Binghamton Constr. Co.*, 347 U.S. 171 (1954); *Central Bank* v. *United States*, 345 U.S. 639 (1953); *Wunderlich* v. *United States*, 342 U.S. 98 (1951); *United States* v. *Moorman*, 338 U.S. 457 (1950); *United States* v. *Penn Foundry & Mfg Co.*, 337 U.S. 198 (1949); *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); *Priebe & Sons* v. *United States*, 332 U.S. 407 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947); *United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946); *United States* v. *Joseph A. Holpuch Co.*, 328 U.S. 234 (1946); *United States* v. *Beuttas*, 324 U.S. 768 (1945); *United States* v. *Blair*, 321 U.S. 730 (1944); *Brooks-Callaway Co.* v. *United States*, 318 U.S. 120 (1943); *United States* v. *Callahan Walker Constr. Co.*, 317 U.S. 56 (1942); *United States* v. *Rice*, 317 U.S. 61 (1942).

These seventeen reversals account for all but two of the Government contract cases coming from the Court of Claims which have been reviewed by this Court since 1942. In the only other two cases so reviewed, this Court affirmed the Court of Claims decision by an equally divided Court. *Bell Aircraft Corp.* v. *United States*, 344 U.S. 860 (1952); *Penner Installation Corp.* v. *United States*, 340 U.S. 898 (1950).

In addition, the need for review by this Court in this case is especially dramatized by the Court of Claims' very recent decisions discussed below. These new Court of Claims decisions were rendered almost simultaneously with this Court's denial of the petitioner's petition for a writ of certiorari.

The basic issue in this case is the nature of the damages that can be recovered by a contractor whose contract is cancelled by the Government. On December 13, 1963, just three days before the petition for certiorari was denied in this case, the Court of Claims issued three decisions involving the nature of damages to be paid by the Government for cancellation of contracts. Those decisions are inconsistent and contrary to prior rulings of that court.

The three cases decided by the Court of Claims on that day which have created absolute chaos in the area of the damages that might be obtained from the Government for termination of contract are *Goldwasser* v. *United States*, Ct. Cl. No. 477-61; *Brown & Son Electric Co.* v. *United States*, Ct. Cl. No. 76-61; and *John Reiner & Co.* v. *United States*, Ct. Cl. No. 431-57.

As one writer has stated, the true explanation for the differing final conclusions in these cases is simply that they were written by judges who hold opposite views. 5 *Government Contractor*, paragraph 582 (1963).

In the *Goldwasser* case, Judge Samuel E. Whitaker writing for the majority stated that where the Government did not in fact terminate a contract under the "Termination for Convenience" clause, its wrongful cancellation of the contract could not later be deemed a convenience termination but must be treated as a contract breach for which the Government must pay common law damages, including anticipatory profits. To this Judge Oscar Davis (who wrote the decision below in this case) and Chief Judge Marvin Jones dissented.

In the *Reiner* case, Judge Davis wrote for the majority and held that the "Termination for Conven-

ience", clause *does* apply to an erroneous contract termination even though the Government never in fact terminated the contract under such a clause. To that, Judge Whitaker dissented. In the *Reiner* decision Judge Davis repeated his ruling in this case below (*G. L. Christian & Associates*) to the effect that the Armed Services Procurement Regulation has the force of law. However, in the *Reiner* case he also stated for the Court of Claims that the Government was not required to adhere to the ASPR termination procedures unless the contractor can show that he was injured by such lack of adherence. If ASPR has the force of law, both parties must be required to follow them. Judge Davis appears to be drawing away from the rigidity of the rule he announced in the instant case.

Most shocking to contractors is Judge Davis' statement in the *Reiner* case that no contractor will be able to satisfy the requirement established by this Court in *United States* v. *Penn Foundry & Mfg. Co., supra,* that he prove by clear and direct proof that he would have earned anticipatory profit. Judge Davis says in *Reiner* that no contractor will be able to carry that burden because he will not be able to show that his contract would have been allowed to continue to completion. Judge Davis based that conclusion on the assumption that a contracting officer will cancel the contract under the "Termination for Convenience" clause "as soon as someone he deemed authoritative had whispered in his ear that he was breaching the agreement by cancelling it in the way he did." What novel legal reasoning! The rights of a contractor to damages for the improper termination of a Government contract are not to be reversed merely because later someone might "whisper" into a contracting offi-

cer's ear. Is it proper or legal that contractors' rights under an annual multibillion dollar Government procurement program are to be affected by *ex post facto* whisperings?

In the *Brown* case as in the *Reiner* case, Judge Davis again writing for the majority applied the measure of damages set forth in the "Termination for Convenience" clause, even though the contract had not been terminated pursuant to that clause; Judge Whitaker dissented thereto.

A reading of these three decisions shows that the various judges of the Court of Claims differ in their conclusions in those cases primarily because they disagree as to what application should be given to the court's holding in *Klein* v. *United States*, 152 Ct. Cl. 8, 285 F.2d 778 (1961). That decision was written by Judge J. Warren Madden whose place, when he retired from the Court of Claims in 1962, was taken by Judge Davis. In his *Reiner* decision, Judge Davis admitted that he was overruling, at least in part, the *Klein* case. (This petitioner, in the case below, had asked the Court of Claims to follow its decision in the *Klein* case.) On the other hand, Judge Whitaker in writing for the majority in the *Goldwasser* case and in his dissent in the *Reiner* case accepts the Court of Claims' previous holding in *Klein* in its entirety.

Judges Whitaker and Davis differ over the effect to be given to the *Klein* case because of the Court of Claims' construction and application in the *Klein* case of this Court's ruling in *College Point Boat Corp.* v. *United States*, 267 U.S. 12 (1925). The Court of Claims pointed out in the *Klein* case that in the *College Point* case the Government was given the right by a 1917 statute to terminate the contract for its conven-

ience but that under the facts in the *Klein* case the Government did not have any such statutory right to terminate a military contract. It added that the Government's right to terminate for default or convenience was as specified in the express terms of that military contract. That is exactly the position of petitioner in this case—no statute gave the Government the right to terminate for convenience petitioner's contract, and the Government's right to terminate was therefore governed by the terms of the contract. The same relevant statutes were applicable to the facts in the *Klein* case as are applicable to the facts in the instant case.

The Court of Claims' decision in the *Goldwasser* case, written by Judge Whitaker, adopted the *Klein* ruling which agrees with petitioner's basic position in this case. On the other hand, in the *Brown* and *Reiner* cases, Judge Davis writing for the majority refused to follow *Klein*. Judge Whitaker dissented in those cases because he was of the opinion that the *Klein* case should control. In his decision below in this case, Judge Davis relied heavily upon the *College Point* decision for his conclusion that the terms of petitioner's contract were not controlling as to the rights of the Government to terminate the contract. As pointed out above, in the *Klein* case the Court of Claims already had held that the *College Point* case did not have such significance. Nevertheless, Judge Davis made no mention of the *Klein* case in his two decisions below in the instant case, even though it was urged as controlling in petitioner's Brief in Support of its Motion for Rehearing and Reargument. (Plaintiff's Brief in Support of Motion for Rehearing and Reargument, pp. 39-42).

In conclusion, it is stressed that since December 13, 1963, there is now a sharp conflict of decisions in the court in which almost all Government contract actions are filed with regard to the basic issue involved in this action, namely, the nature of the damages to which a contractor is entitled for the termination of his contract by the Government. Since the decision of the Court of Claims is not subject to any judicial review except by this Court, it is respectfully urged that this Court resolve the conflict over such a vital issue.

2. Government's Recent Policy of Economy and Military Cutbacks Require Certainty of Rights With Regard to Government Contract Terminations

In December, 1963, the Government cancelled contracts in excess of one billion dollars. The 800 million dollar Dyna-Soar space project was terminated, the Apollo moon-shot program was cut back, many military installations were ordered closed, and threats of other cutbacks to come were rumored. A reappraisal of the military and space programs, in light of the present international picture, has brought the executive branch of the Government to the realization that this country might eventually be returning to a peacetime economy. Cancellation of contracts is harrowing and difficult under the best circumstances; it becomes treacherous and horrifying when rights are subject to chaotic legal uncertainties such as are shown by the three Court of Claims decisions issued on December 13, 1963. It is vital to this country's economy that such uncertainty be removed by a thorough review by this Court of the substantive problem of the nature of a contractor's recovery for the termination by the Government of his contract.

3. A Contract Approved by the Secretary of Defense Pursuant to Specific Statutory Authority Is Not Valid If Contrary to Departmental Regulations

Certainly, the above statement is not the law, but it will be if the decision below is allowed to stand. It is most unusual to contend that the head of a department who is the only one authorized to issue the regulations cannot approve deviations from them. Good administrative practice requires that he have such a right.

In its petition for a writ of certiorari, petitioner failed to contend that the approval by the Secretary of Defense through his designee, the Assistant Secretary of Defense (Properties and Installations), of the housing contract form, constituted a deviation under ASPR, 1-109 from the requirements of the Armed Services Procurement Regulation. Therefore, since the contract did not contain a "Termination for Convenience" clause, the petitioner is entitled to common law damages for the Government's cancellation of its contract.

4. Concern Over the Decision Below Continues to Mount

As pointed out in the petitioner's Petition for a Writ of Certiorari and its Reply Brief, many legal writers have commented on the decision below. Most of those reviews have been critical and predicted adverse results. Such comments may be found in:

1. Commerce Clearing House, *Government Contracts Reporter*, paragraph 80,075 (1963);
2. 51 *Georgetown Law Journal* 842 (1963);
3. 32 *George Washington Law Review* 111 (1963);
4. *OGC Newsletter*, Office of the General Counsel, Department of the Navy, Vol. 9, No. 1, February, 1963;
5. 10 *Federal Bar News* 333 (1963).

More recently in 4 McBride and Wachtel, *Government Contracts*, section 30.40 (Matthew Bender & Co., 1963), it is stated after pointing out that the decision below is supported by the *College Point* case:

> The Armed Services Procurement Act contains no language expressly making mandatory the inclusion of a termination clause in contracts let by the Department of Defense. While it is not contended that the ASPR section making mandatory the inclusion of a termination clause is invalid, it is contended that the statute does not require such a clause. It also should be noted that the contract here in issue had had the approval of higher authorities in the contracting agency, the Department of the Army. Those authorities, by the terms of the Armed Services Procurement Regulation, ASPR 1-109 (March 1, 1963) are permitted to deviate from the mandatory language of that regulation. Consequently, it is the view of the authors that the decision cannot be supported.

Professor Arthur John Keeffe in his regular column devoted to the problems of practicing lawyers in the December, 1963, issue of the *American Bar Association Journal* (49 A.B.A.J. 1225, 1226) poses dramatically the questions presented by the decision below:

> Oscar Davis may by this decision revolutionize Government contracting. Why have any contract at all? Shall we just write a contractor and say we give you the job pursuant to all the appropriate regulations and in accordance with the way the Government does business? What happens to the disputes clause? Is that required even when omitted?
>
> Judge Davis merits the Procurement Oscar of 1963.

These questions and many more raised, but unanswered by the decision below, make it imperative that

the Court of Claims decision be reviewed. The only available resort is review by this Court. Furthermore, the effect of such a review is not limited to the instant case. Another case, identical in issue, is now pending before the Court of Claims. *J. W. Bateson Co. v. United States*, No. 365-60, Ct. Cl. July 12, 1963 (remanded for proceedings to determine the amount of damages).

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Claims.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Petition for Rehearing of the order of this Court denying the Petition for Writ of Certiorari, entered on December 16, 1963, and the order denying the Petition for Rehearing, entered on January 16, 1964. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of the Supreme Court of the State of Washington in *Murray* v. *Washington*, 384 P.2d 337 (Wash. 1963) and now pending before this Court (No. 851) on appeal from the Supreme Court of the State of

Washington, is in direct conflict with that which the United States Court of Claims rendered in this case, and thus has created a conflict of decisions which should be resolved by this Court. Although this Petition for Rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based could not be reasonably known and, in fact, were actually not known by petitioner until after such time; and the Court clearly has power, in its discretion, to entertain the petition. *Robert Sash & Door Co.* v. *United States*, 282 U.S. 829 (1930); *Duquesne Steel Foundry Co.* v. *Burnet*, 282 U.S. 830 (1930); *Douglas* v. *Willcuts*, 295 U.S. 722 (1935); *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 474 (1947); See *R. Simpson & Company* v. *Commissioner*, 321 U.S. 225, 228-30 (1944) where this Court speaks of "the inherent power of the Court to reconsider its judgments" and denies the rehearing solely because of additional limitations contained in the Internal Revenue Code of 1926.

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June 4, 1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING OF ORDERS DENYING PETITION FOR WRIT OF CERTIORARI AND PETITION FOR REHEARING THEREOF

Petitioner prays for rehearing of the order of this Court denying the Petition for Writ of Certiorari in this case, entered on December 16, 1963, the order denying the Petition for Rehearing of that order, entered on January 16, 1964, and that this Court issue a writ of certiorari to review the judgment of the United States Court of Claims as prayed for in the original petition filed on October 10, 1963.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. A Conflict of Decisions Has Recently Developed.

At the time of this Court's order on December 16, 1963, petitioner did not know of any conflict of decisions on the question sought to be reviewed. There is

now pending before this Court (No. 851) on appeal from the Supreme Court of the State of Washington a case (*Murray* v. *Washington*, 384 P.2d 337 (Wash. 1963)) involving the decision by that court which is in direct conflict with the decision made by the United States Court of Claims in this case. Petitioner was not aware of the issuance of such decision by a five to four vote by that court on August 1, 1963. Only subsequent to the issuance of the orders by this Court in this matter was the appeal from the decision of the Supreme Court of the State of Washington filed with this Court on February 15, 1964. A copy of the opinion of the Supreme Court of the State of Washington is appended hereto.

In the *Murray* case, as in the present case, the issue centers around the interpretation of a contract for the construction of military housing, entered into pursuant to the provisions of the Capehart Housing Act.

In order to avoid the use of appropriated funds in connection with the construction of military housing, a statutory plan was set up. As part of such plan, three parties were involved; the contractor, a mortgagor-builder corporation formed by the contractor, and the Government. The mortgagor-builder corporation obtained a lease of the real estate from the Government upon which the housing was to be constructed. It also obtained a commitment from the Federal Housing Administration to insure a mortgage loan for the entire contract price, secured only by its leasehold interests. The United States agreed to repay the entire mortgage loan. The loan was obtained by such corporation from a private lender on the strength of the FHA insurance commitment and the payment agreement of the United States.

The parties to the housing contract were the construction contractor, the mortgagor-builder corporation, and the United States. Such contract provided that the construction was to be under the supervision of the United States and was to be accomplished in conformity with the plans and specifications furnished by the United States. Payment to the construction contractor was to be made by the mortgagor-builder corporation solely from the mortgage loan funds. As the housing units became available for occupancy they were placed under the control of the United States and were occupied by military personnel. Upon the completion of the housing contract the Government received all stock and interest of the mortgagor-builder corporation and assumed the mortgage. The quarters allowances of the military personnel were used to pay off, over a period of years, the mortgage loan made by the private lender.

In the *Murray* case the State of Washington assessed excess retail sales taxes of $320,893.97 against the housing contractor. The amount was measured by the total contract price for the military housing. It was assessed on the grounds that the housing contractor should have collected the retail sales tax (measured by the total contract price), from the mortgagor-builder corporation and paid the same over to the State of Washington. The Washington Supreme Court, with four of the nine judges dissenting, affirmed the judgment of the Superior Court. In construing and applying the state sales tax statute, that court held that the legal incidence of the sale is imposed by the statute on the "buyer" and not on the eventual "consumer," that the "buyer" of the military housing was not the United States but was rather the mortgagor-builder

corporation, and that the mortgagor-builder corporation was not a federal instrumentality and thereby immune from state taxation.

In the present case, Commissioner Mastin G. White of the United States Court of Claims, in finding that petitioner's housing contract was not subject to the Armed Services Procurement Regulations, ruled as did the Supreme Court of the State of Washington, that the housing contract was a private matter between petitioner and the mortgagor-builder corporation and that federal appropriated funds were not involved in that transaction. The reasoning of Commissioner White is exactly the same as the reasoning of the Washington Supreme Court and the decisions of other courts relied upon by that court.

The United States Court of Claims reversed Commissioner White's ruling and findings in favor of petitioner and found that the housing contract, though of an unusual character, was in substance a contract with the United States and did involve the use of appropriated funds. The Washington Supreme Court disagrees with the Court of Claims as to the nature of the housing contract and quotes from the decision in *United States ex rel. Miles Lumber Co.* v. *Harrison & Grimshaw Constr. Co.*, 305 F.2d 363 (10th Cir.), *cert denied*, 371 U.S. 920 (1962). The latter case involved the question as to whether the provisions of the Miller Act applied to the performance bond given by the housing builder under a Capehart contract. The Supreme Court of Washington quoted the following statement from the decision in that case:

> ". . . The projects are of a private nature until completition [sic] and assumption of control by the government. *The mortgagor-builder has a*

> *contract with a construction company to build the project. The constructor looks to the mortgagor-builder for payment for his work and owes to the mortgagor-builder the obligation to perform. . . .* (Italics ours.)"

One of the basic conclusions reached by the Washington Supreme Court was that the "buyer" of the military housing constructed by appellants was not the United States but was rather the mortgagor-builder corporations, and that the mortgagor-builder corporations were not federal instrumentalities and thereby immune from state taxation. This finding is also consistent with the Court of Claims Commissioner's finding in favor of petitioner; it is contrary to that of the Court of Claims. The Washington Supreme Court also determined that the mortgagor-builder corporation is not an agency of the United States and therefore was subject to the sales tax. In making that finding it primarily relied upon decisions by two other responsible courts.

In *S. S. Silberblatt, Inc.* v. *Tax Comm'r*, 5 N.Y.2d 635, 159 N.E.2d 195, 186 N.Y.S.2d 646 (1959), the highest court in the State of New York held that the mortgagor-builder corporation was subject to the state mortgage recording tax, as quoted by the Washington Supreme Court:

> "They [mortgagor builder corporations] possess all of the requisites and responsibilities of corporate existence and, as such, *are an entity separate and apart from the United States (United States* v. *Strang, 254 U.S. 491) and this is so, notwithstanding the fact that all of the capital stock of each corporation will ultimately be owned by the Federal Government (Sloan Shipyards* v.

United States Fleet Corp., 258 U.S. 549, 42 S.Ct. 386, 66 L.Ed. 762) . . . (Italics ours)"

In *United States ex rel. Acme Furnace Fitting Co.* v. *Ft. George G. Meade Defense Housing Corp. No. 1*, 186 F. Supp. 639 (D. Md. 1960), wherein the leasehold interest required by the mortgagor-builder was held to be subject to the Maryland mechanics' lien law, the court stated:

> . . . the so-called Capehart Act contemplates leaving the entire arrangement for the financing and construction of Capehart housing projects in the hands of private enterprise until the point at which the government has secured the capital stock of the Housing Corporation. . . .

Primarily on the basis of such reasoning the Washington Supreme Court concluded that the mortgagor-builder corporation serves an independent and distinct purpose and is not a federal agency.

The rationalization followed by the Washington Supreme Court was previously advanced by petitioner in its Petition for Writ of Certiorari (pp. 21-24). Set forth there are two cases in which federal circuit courts of appeal held that the Miller Act (40 U.S.C. secs. 270a-e (1958), amended Supp. IV (1959-62)) did not apply because of the private nature of the Capehart housing contract. *Continental Cas. Co.* v. *United States ex rel. Robertson Lumber Co.*, 305 F.2d 794 (8th Cir.), *cert. denied*, 371 U.S. 922 (1962); *United States ex rel. Miles Lumber Co.* v. *Harrison & Grimshaw Constr. Co.*, 305 F. 2d 363 (10th Cir.), *cert. denied*, 371 U.S. 920 (1962).

Since that time several federal district courts and three state supreme courts have reached the same con-

clusion, i.e., that the bond in Capehart projects is not a Miller Act bond and that the provisions of the Miller Act do not apply. *United States ex rel. Robertson Lumber Co. v. Cedric Sanders Co.*, 223 F. Supp. 435 (D.N.D. 1963); *United States ex rel. Fogle* v. *Hal B. Hayes & Associates, Inc.*, 221 F. Supp. 260 (N.D. Cal. 1963); *National Bank* v. *Terminal Constr. Corp.*, 217 F. Supp. 341 (D.N.J. 1963); *Northwest Lumber Sales, Inc.* v. *S. S. Silberblatt, Inc.*, 211 F. Supp. 479 (E.D. Mo. 1962); *Minneapolis-Honeywell Regulator Co.* v. *Terminal Constr. Corp.*, 41 N.J. 500, 197 A.2d 537 (1964); *Allsop Lumber Co.* v. *Continental Cas. Co.*, 73 N.M. 64, 385 P.2d 625 (1963); *Ireland's Lumber Yard* v. *Progressive Contractors, Inc.*, 122 N.W.2d 554 (N.D. 1963).

The Miller Act requires every person constructing or repairing a public building or public work of the *United States* to furnish two particular ("Miller Act") bonds. The statute makes definite provisions regarding notice, statute of limitations and courts having jurisdiction. Of even more significance is the fact that section 10-103 of the Armed Services Procurement Regulation (rev. 1964) makes mandatory the furnishing of these bonds "in connection with any [Government] construction contract." A parallel provision in ASPR regarding termination for convenience of the Government was held by the Court of Claims to be applicable to the Capehart contract involved in this case. The majority of courts, however, have found that the provisions of the Miller Act do not apply to Capehart contracts and that the bonds furnished by Capehart contractors may differ materially from Miller Act bonds either because Capehart contracts are not Government construction contracts to

build public works or because the Capehart Act (42 U.S.C. sec. 1594(a) (1958)) gives the Secretary of Defense the authority to draft different bonds for these unique projects.

Not every state and federal decision has followed this reasoning. See *Lasley* v. *United States ex rel. Westerman*, 285 F.2d 98 (5th Cir. 1960). One court trying to reach a compromise position, correctly summarized the present state of affairs:

> We note in passing that the possibility of the "judicial chaos" to which we alluded on page 474 of 215 F. Supp. is developing at a predictably rapid rate. Not only are several of the United States Courts of Appeals in open and complete conflict, but the first two of the potential fifty State appellate courts to decide the basic question of jurisdiction over the subject matter are also in open conflict.

Travis Equip. Co. v. *D & L Constr. Co.*, 204 F. Supp. 410, 417 (W.D. Mo. 1963).

Today a military housing contractor finds himself in the following legal dilemma. In any contract action in the Court of Claims brought by a housing contractor, the court will construe the rights of the parties on the basis that the mortgagor-builder corporation is a federal instrumentality using appropriated funds to pay the housing contractor. In the federal district and state courts where the housing contractor might have suits involving state taxes, Miller Act claims and subcontractors, the mortgagor-builder corporation may be considered to be a distinct, private entity using private funds to compensate the builder. Thus, an unjustifiable discrimination exists between the litigants in different jurisdictions.

2. The Question Involved in This Case Continues to Be One of Great Practical Importance in the Government's Multi-Billion Dollar Procurement Program.

The substantial public importance of the questions involved in this case are shown by the critical and adverse comments made by many legal writers since the decision has been rendered. Such comments may be found in:

1. 49 *American Bar Association Journal* 1225 (1963);
2. Commerce Clearing House, *Government Contracts Reporter*, paragraph 80,075 (1963);
3. 10 *Federal Bar News* 333 (1963);
4. 32 *George Washington Law Review* 111 (1963);
5. 51 *Georgetown Law Journal* 842 (1963);
6. 5 *Government Contractor*, sections 54, 442 (1963);
7. 4 McBride and Wachtel, *Government Contracts*, section 30.40 (Matthew Bender & Co., 1963);
8. *OGC Newsletter*, Office of the General Counsel, Department of the Navy, Vol. 9, No. 1, February, 1963;
9. 4 *Santa Clara Lawyer* 96 (1963).

As several of these legal writers have stated, the Capehart Act which deals specifically with the construction of military housing, must be given precedent over any general statute such as the Armed Services Procurement Act of 1947, as amended. The housing contract involved in this litigation states specifically that it is made under the authority of the Capehart Act (42 U.S.C. sec. 1594 (1958)). Pursuant to the specific authorization given by that Act, the Assistant Secretary of Defense (Installations and Logistics), approved the form of housing contract struck down

by the Court of Claims in this litigation. That official, for good practical reasons, deemed it unnecessary and disadvantageous to have a Termination for Convenience article in the housing contract. There is no legal basis for the Court of Claims to reform his act.

3. The Decision by the Court of Claims Has the Effect of Abolishing Contract by Negotiation of the Parties.

A Government contractor today subjected to the decision of the Court of Claims in this case, cannot possibly know his contract with the Government. The decision by the Court of Claims holds that the document executed by the parties does not set forth their agreement. The parties are also subject to a myriad of regulations that have been issued by the Government department or agency. As has been pointed out by the many writers referenced above, the regulations are not accessible and are inconsistent and confusing in their language. As a result of the Court of Claims' decision in this case, the obligations of parties to a Government contract change from day to day as contract administrators reinterpret the various regulatory provisions.

The decision by the Court of Claims in this case has brought Government contracting to the point where it no longer can be called an agreement between two parties. It is a matter of contract by fiat; Government contracting is now contract by regulations. The freedom of contract which this Court has been so desirous to maintain in Government procurement no longer exists as a result of the decision below. Yet, Government procurement involves about one-sixth of our gross national product. To subject so much of this country's industry to Government edicts not subject

to question or review appears inconceivable under our American system. Such a philosophy must in the long run threaten the very freedoms which this Court has always been so desirous of maintaining.

CONCLUSION

For the reasons set forth above and in the Petitions for Writ of Certiorari and Rehearing, it is respectfully urged that rehearing be granted and that, upon such rehearing a Writ of Certiorari issue to the Court of Claims.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

/s/ GILBERT A. CUNEO
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APPENDIX

Opinion of the Supreme Court of the State of Washington

[Nos. 36226, 36227, 36228, 36229. En Banc. August 1, 1963]

IAN MURRAY *et al., Appellants*, v. THE STATE OF WASHINGTON *et al., Respondents.*

INLAND EMPIRE BUILDERS, INC., *et al., Appellants*, v. THE STATE OF WASHINGTON *et al., Respondents.*

HEBB & NARODICK CONSTRUCTION CO., INC., *et al., Appellants*, v. THE STATE OF WASHINGTON *et al., Respondents.*

HEBB & NARODICK CONSTRUCTION CO., INC., *Appellant*, v. THE STATE OF WASHINGTON *et al., Respondents.*

Consolidated appeals from judgments of the Superior Court for Thurston County, Nos. 32176, 32186, 32195, 32196, Charles T. Wright, J., entered July 3, 1961. *Affirmed.*

Consolidated actions to recover taxes paid under protest. Plaintiffs appeal from judgments in favor of the defendant.

Bogle, Bogle & Gates, Edward G. Dobrin, and *Richard S. Sprague*, for appellants Murray *et al.*

Allen, DeGarmo & Leedy and *Seth W. Morrison*, for appellants Inland Empire Builders, Inc., *et al.*

Casey & Pruzan, by *Carl Pruzan*, for appellants Hebb & Narodick Construction Co., Inc., *et al.*

The Attorney General, John W. Riley, Chief Assistant, and *Timothy R. Malone, Assistant*, for respondents.

OTT, C. J.—This appeal is a consolidation of four actions brought by several contractors to recover a retail sales tax paid under protest, and to enjoin the State Tax Commission from assessing the sales tax in connection with the construction of Capehart Act housing at military installations in Washington.

From adverse judgments, the contractors appeal.

The facts upon which these appeals are predicated are not in dispute. The legal issue involved is whether the transactions, pursuant to which the military housing was constructed, are shielded from state taxation by the sovereign immunity granted to the United States government by the federal and state constitutions.

Each of the appellants was awarded contracts under the provisions of the Capehart Act (69 Stat. 651-654 as amended). Since the contract provisions are identical, we will refer only to the material portions of the documents in cause No. 36226. The procedure for the execution of a contract under the act, in so far as here material, may be stated as follows:

The Secretary of Defense, after determining a need for military housing, issues an invitation for bids. The contractor submitting the lowest acceptable bid receives a "Letter of Acceptability" from the Secretary. The letter requires the successful bidder to establish a private "mortgagor-builder" corporation under the laws of the state of Delaware, and to qualify it to do business in the state involved. The contractor furnishes the corporation with $1,000 for capital stock, purchases all of it, and elects its officers and directors. The United States government executes to the corporation a 55-year lease of the real estate upon which the housing is to be constructed. The corporation is to obtain private financing by giving a mortgage on its leasehold, and obtain a commitment from the Federal Housing Administration to insure its mortgage loan. The mortgage loan is in the amount of the contractor's bid.

The "Letter of Acceptability" prescribes the "initial closing" procedure, which entails the execution of the following documents:

(1) The 55-year lease between the United States and the corporation for a consideration of $1,000, paid by the corporation to the United States government. The corporation agrees, during the period of construction, to

maintain insurance and to save the United States government harmless from many laws, ordinances, and regulations applicable to the leased premises, with regard to construction, sanitation, licenses or permits to do business.

(2) The corporation executes a note, secured by a real and chattel mortgage on its real-estate leasehold, to the private lender.

(3) The corporation, contractor, and the United States execute a housing contract which provides that all construction is to be inspected and supervised by the United States; that progress payments are to be made by the corporation from the mortgage loan, upon request of the contractor and approval of the United States, and that, upon full payment, title to the housing units vests in the United States, subject to contractor liability for latent defects. The contract further provides that the contractor shall act as agent for the corporation, guarantee its performance, and furnish a performance bond to the corporation and the mortgagee.

(4) An irrevocable escrow agreement is executed which provides that the resignation of the officers and directors of the corporation, and the stock certificates of the corporation, endorsed in blank, are to be placed in escrow, with instructions to the escrow holder to deliver these documents to the United States upon completion and acceptance of the project.

(5) The United States executes a written guarantee to pay the mortgage installment payments to the private mortgagee and/or the Federal Housing Administration, the insurer.

The provisions of the Capehart Act were fully complied with by the contractors involved in these appeals.

Appellants' assignments of error raise two principal issues: First, the appellant contractors contend that, under Washington law, the consumer of the housing project is

the party liable for payment of the sales tax, and that, as a result of the statutory method for the construction of Capehart housing, the United States is the consumer and, therefore, its constitutional immunity from state taxation applies. Secondly, appellants contend that the mortgagor-builder corporation is an agency of the United Sates and, as such, is immune from state tax.

[1] The function of interpreting state statutes to determine who is liable for payment of a sales tax is reserved to the state courts involved. *Alabama* v. *King & Boozer*, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R. 615 (1941); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954).

RCW 82.08.020 provides that ". . . there shall be collected a tax on each retail sale in this state . . .". A retail sale is defined in RCW 82.04.050 as including

". . . the sale of or charge made for tangible personal property consumed and or for labor and services rendered in respect to the following: . . . (b) the constructing . . . of new or existing buildings or other structures under, upon, or above real property *of or for consumers*, . . ." (Italics ours.)

A consumer is defined in RCW 82.04.190(4) as "Any person who is an *owner, lessee or has the right of possession* to or an easement in real or personal property . . .". (Italics ours.)

RCW 82.08.050 provides in part:

"The tax hereby imposed shall be paid by the *buyer* to the seller, and each *seller* shall collect from the *buyer* the full amount of the tax payable in respect to each taxable sale . . .

"In case any seller fails to collect the tax herein imposed . . . he shall . . . be personally liable to the state for the full amount of the tax." (Italics ours.)

Appellants concede that a retail sale, as defined in RCW 82.04.050, did occur, but contend that the consumer defined in RCW 82.04.190, and the buyer denominated in RCW 82.08.050 are synonymous, and that the United States government is the consumer and taxable party because it becomes the owner of the housing units upon their completion and acceptance.

[2] With this contention, we do not agree. One of the purposes of RCW 82.04.050 is to define the event that gives rise to a taxable transaction, which is the rendition of labor and services in the construction of new buildings upon real property of or for consumers. RCW 82.04.190 establishes the means by which the consumer is identified. These sections do not designate the party liable for payment of the tax in any given transaction. RCW 82.05.050 provides that the retail sales tax shall be borne by the buyer, who is primarily liable for payment of the tax. *Kaeser* v. *Everett*, 47 Wn.(2d) 666, 289 P.(2d) 343 (1955).

We must therefore determine who is the buyer under the facts of the instant case. In this regard, appellants contend that the United States is the buyer because it bears the economic burden of paying for the military housing, by virtue of its guarantee of the mortgage obligation.

In *Alabama* v. *King & Boozer*, *supra*, the state of Alabama, pursuant to a statute which imposed the sales tax upon the purchaser, levied a sales tax upon the sale of lumber to a contractor who was constructing installations for the Army. It was there contended that the sales tax could not be collected from the contractor for the reason that the United States was the purchaser, within the meaning of the Alabama statute. In answering this contention, the Supreme Court of the United States held:

". . . The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller, who is required 'to add to the sales price' the amount of the tax and collect it when the sales price is collected.

whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. *But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured by the sales price, is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. . . .*" (Italics ours.)

The court concluded:

"We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James* v. *Dravo Contracting Co., supra* [302 U.S. 134]."

[3, 4] Applying this rule, the buyer is the person who is *legally obligated* to pay the seller in any transaction. The housing contract executed by the parties provided that "The mortgagor-builder [corporation] shall pay the eligible-builder [contractor] for the performance of this Housing Contract, and all other obligations of the eligible builder herein. . . ." By the express terms of the contract, the corporation, and not the United States, was obligated to pay the appellant contractors; hence, the corporation was the buyer under the statute. Under the provisions of the Capehart Act and the facts in the instant case, the United States government was not obligated to pay the seller. The fact that the ultimate economic burden of the tax may fall

upon the United States does not vitiate a state tax on the transactions. *Alabama* v. *King & Boozer, supra; Kern-Limerick, Inc.*, v. *Scurlock, supra; United States* v. *Detroit*, 355 U.S. 466, 2 L.Ed.(2d) 424, 78 S.Ct. 474 (1958); *E. I. Du Pont de Nemours & Co.* v. *State*, 44 Wn.(2d) 339, 267 P.(2d) 667 (1954).

Our conclusion in this regard is also supported by the following cases:

United States v. *Harrison & Grimshaw Constr. Co.*, 305 F.(2d) 363 (1962), involved the question of whether the provisions of the Miller Act applied to the performance bond given by the eligible builder under a Capehart Act contract. The court held (p. 368):

". . . The projects are of a private nature until completion and assumption of control by the government. *The mortgagor-builder has a contract with a construction company to build the project. The constructor looks to the mortgagor-builder for payment for his work and owes to the mortgagor-builder the obligation to perform . . .*" (Italics ours.)

In *In re S. S. Silberblatt, Inc.*, v. *Tax Comm. of the State of New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), it was said:

"Likewise, we must reject appellant's contention that the subject mortgages, as direct obligations to the United States, are immune from State or local taxation, as provided in section 3701 of the Revised Statutes of the United States (U. S. Code, tit. 31, § 742) which exempts 'Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States' since they are not 'of the same type as those specifically enumerated' in the statute (*Smith* v. *Davis*, 323 U.S. 111, 117). Under the arrangement authorized by the Enabling Act, it is clear that the device employed was designed to relieve the Government of its financially burdensome obligation to provide housing for its military personnel and at the

same time avoid increasing the national debt. It did not pledge its credit in the usual sense, but merely guaranteed each 'periodic payment' based on a monthly average of $90 per family unit."

Congress, in its discretion, by enacting the Capehart law, chose to leave the hazards of construction, the purchasing of proper materials, and the furnishing of proper labor performance to private contractors and private lenders. It chose to guarantee only the payment to the private lender, after units acceptable to the government were erected upon the leased premises. We conclude, therefore, that the mortgagor-builder corporation was the party legally obligated to pay the contractor, and that it was the buyer denominated in RCW 82.08.505.

Is the mortgagor-builder corporation an agency of the United States?

Appellants contend that title to the units, when built in accordance with the contracts, vested in the United States; that the United States controlled and dictated the terms of the construction contracts, and that it guaranteed the mortgage obligation and ultimately gained ownership of all of the corporation's capital stock; hence, the corporation is a government agency.

In support of this contention, appellants rely on *Clallam County* v. *United States*, 262 U.S. 341, 68 L.Ed. 328, 44 S.Ct. 121 (1923); *Green* v. *Eglin AFB Housing, Inc.*, 104 So.(2d) 463 (Fla. 1958); and *Knapp-Stiles, Inc.*, v. *Michigan Department of Revenue*, CCH 2 Mich. Tax Cases ¶ 200-202 (1962).

The *Clallam County* case held that a corporation, organized pursuant to a World War I emergency act which authorized the Director of Aircraft Production to establish one or more state corporations to produce war materials, was an agency of the United States and, as such, its activities were exempt from state taxation. The case is not apropos. The Director of Aircraft Production was, by law, an agent of the government. In the instant case, the

successful bidders were not authorized agents of the government. Furthermore, the facts in the cited case did not disclose any evidence of an intent to distinguish the corporate activities from those of the United States. In this regard, the court stated (p. 345): ". . . This is not like the case of a corporation having its own purposes as well as those of the United States . . ."

In the *Green* case, the court stated (p. 467):

"'. . . The question here is the extent of an *exemption* granted by *state statute*. Had the legislature intended to limit the exemption to that required by the Federal Constitution there would have been no occasion whatever to go further than to say "There shall also be exempted all sales made to the United States." But the legislature intended to grant a greater exemption and made that intent clear . . .'"

In *Knapp-Stiles, Inc.*, v. *Michigan Department of Revenue*, *supra*, the court stated:

"At the outset, it may be noted that the question is *not* whether the State has the *power* to impose such tax upon contractors who are performing contracts with the United States.

. . .

"Michigan has the power to impose such a tax. Has it done so? Or has it, by the language of the statute, exempted the sales here involved from the tax? . . ."

In the *Green* and *Knapp-Stiles* cases, the result was determined by interpreting a state exemption statute much broader than our own, for which reason the cases are distinguishable.

[5] The mortgagor-builder corporate entity created for the purpose of constructing and financing Capehart housing serves a separate and distinct function from that of the United States. That such a corporation is not an agency of the United States is sustained by the following decisions:

In *In re S. S. Silberblatt, Inc.* v. *Tax Commission of the State of New York, supra*, the New York Court of Appeals held that the mortgagor-builder corporation was subject to that state's mortgage recording tax, stating (p. 641):

"The appellant's contention that this petitioner and the five corporate mortgagors are instrumentalities of the Federal Government or its agencies and, as such, are exempt from State and local taxation, is without substance. . . . At the time of the execution, delivery and recording of these mortgages, each of the mortgagors was a private corporation, all of the capital stock of which was privately owned. They were created for a commercial purpose for private profit, as distinguished from a governmental purpose. In the absence of statute to the contrary, it may not be assumed that a governmental function was involved. They possess all of the requisites and responsibilities of corporate existence and, as such, *are an entity separate and apart from the United States* (*United States* v. *Strang*, 254 U.S. 491) *and this is so, notwithstanding the fact that all of the capital stock of each corporation will ultimately be owned by the Federal Government* (*Sloan Shipyards* v. *United States Fleet Corp.*, 258 U.S. 549, 42 S.Ct. 386, 66 L.Ed. 762) . . ." (Italics ours)

In *United States* v. *Ft. George G. Meade Defense Housing Corp., No. 1*, D.C., 186 F.Supp. 639 (1960), it was held that the leasehold interest acquired by the mortgagor-builder corporation from the United States was subject to the Maryland mechanics lien law because

". . . the so-called Capehart Act contemplates leaving the entire arrangement for the financing and construction of Capehart housing projects in the hands of private enterprise until the point at which the government has secured the capital stock of the Housing Corporation . . ."

The reasoning in the following cases, although not arising from Capehart transactions, supports the view that the

mortgagor-builder corporations are not agencies of the government.

In *E. I. Du Pont de Nemours & Co.* v. *State*, 44 Wn. (2d) 339, 267 P.(2d) 667 (1954), it was contended that the Du Pont Company was an agent or instrumentality of the United States in its operation of the Hanford Engineer Works. We held (pp. 349,350):

"... the fact that the government reserved and exercised the right to restrict or control the action of the contractor as to its general activities does not establish the existence of an agency relationship. ...

"...

"It is also without significance that all of the real and personal property utilized in performing the contract was owned by the government. [Citing cases.] The same is true with regard to the fact that the government exerted unusual supervisory controls over every phase of the contractor's activity. [Citing case.]"

In *United States* v. *Brown*, D.C., 41 F.Supp. 838 (1941), the contention was rejected that certain Regional Agricultural Credit Corporations, created pursuant to federal enactment, were immune from state taxation because the United States owned all of the capital stock of the corporations. The court said (p. 840):

"Whether or not these Regional Corporations shall enjoy sovereign immunity from taxation is wholly a question of Congressional intent. They are purely commercial corporations exercising no sovereign function. In the absence of statutory provision, there is no reason why they should be exempted from taxation, especially in view of Congressional policy concerning this type of corporation, evidenced by many statutory provisions expressly subjecting the real property of similar corporations to taxation.

"The mere fact that the United States owns all the capital stock of these corporations is not alone sufficient to endow them with sovereign immunity, nor do they acquire such immunity merely because they are the medium through

which the Government carries out certain proprietary activities. Note, 83 L.Ed. 799 et seq.

". . .

"When a corporation is created for commercial as distinguished from Governmental purposes, it is ordinarily implied in the absence of statutary provisions to the contrary, that such corporation shall have all the requisites and responsibilities of corporate existence, even though the United States owns all the stock. Such a corporation is an entity separate from the United States. *United States* v. *Strang*, 254 U.S. 491, 41 S.Ct. 165, 65 L.Ed. 368."

We conclude that the mortgagor-builder corporation, having served an independent and distinct purpose in the taxable event, is not a federal agency.

Further, Congress has not expressed a legislative intent to immunize a Capehart corporation from state taxation. The invitations to bid expressly provided:

"Nothing in this Invitation for Bids shall be deemed to relieve the eligible builder of any liability for the payment of sales or use taxes properly levied."

For the reasons stated, the sales tax was "properly levied" upon these transactions. Appellants, under the statute, were obligated to collect the tax from the mortgagor-builder corporations. Having failed to collect it, appellants are liable for the tax. RCW 82.08.050, *supra*.

The judgments are affirmed.

FINLEY, ROSELLINI, HAMILTON, and HALE, JJ., concur.

HUNTER, J. (dissenting)—The majority say that the sales tax must fall upon the person legally obligated to pay for construction of the military housing. With this I agree.

The majority then state that, by the express terms of the contract with the mortgagor-builder, the Delaware corporation, and not the United States was legally obligated to pay the appellant contractors; hence, the corporation was the buyer under the statute. The fact that the ultimate

economic burden of the tax may fall upon the United States does not constitute it as the person legally obligated to pay the tax. Neither do I disagree with this rationale.

It is my disagreement with the majority in the disposition of the issue relating to whether the mortgagor-builder corporation is an instrumentality of the United States that bring me to a result contrary to that of the majority in this case.

Under the established rule for the construction of contracts, a contract must be picked up by its four corners and considered in its entirety. In so doing, it is inescapable to conclude other than that the prime purpose of the housing contract was the construction of military housing for the exclusive use of the United States. It was necessarily the obligation of the government to pay for this housing and, although it did not wish to be directly obligated, the United States, in causing the Delaware corporation to be organized, did so to provide a means to carry out its obligation to compensate the contractors for the construction of this housing.

In *Clallam County* v. *United States*, 263 U.S. 341, 68 L.Ed. 328, 44 S.Ct. 121 (1923), it was held that a corporation created for the purpose of operating a sawmill and railroad for the promotion of the war effort and wholly owned by the United States was an instrumentality of the United States. The court there said:

"In short the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and *was used by it solely as means to that end*, and when the war was over it stopped its work except so far as it found it necessarly to go on in order to wind up its affairs. . . .

". . .

"The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted

grounds, but that taxation of the property of the agent is not taxation of the means. We agree that it 'is not always, or generally, taxation of the means,' as said by Chief Justice Chase in *Thomson* v. *Pacific Railroad*, 9 Wall 579, 591. But it may be, and in our opinion clearly is when as here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. *'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. . . .'* (Italics mine.)

Contemporaneous with the signing of the housing contract, the stock of the corporation in the instant case was irrevocably placed in escrow, together with the resignation of the officers and directors, to be delivered to the United States at the conclusion of the construction of the housing. There was no possible contingency for the return of the stock to the stockholders or the documents of resignation to the officers and directors. The corporation owned nothing of any value in the housing being constructed. It served solely as a means to the end of obtaining military housing for the United States. There was no possibility for it to engage in any purpose other than to serve the end of obtaining military housing for the United States on this exclusive project. Because it had no purposes independent of those of the United States, the corporation was nothing more than an instrumentality thereof.

The appellants cite *Green* v. *Eglin AFB Housing, Inc.*, 104 So.(2d) 463 (Fla. 1958), which is persuasive of their contention. There, under the authority of the Capehart Act, the government entered into a contract virtually identical with that of the instant case for the construction of military housing at the Eglin Air Force Base in Florida. The Florida court in effect found that the Delaware corporations were government instrumentalities, stating:

"'The AFB corporations were created at the direction of the United States for the sole purpose of borrowing money to be expended in constructing facilities needed by the United States, to be repaid by the United States and further securing the payment of this money by a mortgage upon property of the United States. These corporations will continue in existence until the mortgage debts are paid, so as to provide a party against whom the mortgages may be foreclosed in the remote contingency that the United States defaults in its obligation to pay the mortgage debt.

"'Even if we regard the AFB corporation as private enterprises, their interest in the property is so negligible—lessees without right of use or possession—as to make it entirely unrealistic to hold that it destroys the status of these buildings as a part of the public works of the United States.

"'It is very doubtful if these corporations should be regarded as anything other than agencies or instrumentalities of the Federal Government. In *Clallam County, Wash.* v. *United States*, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328, the Supreme Court held that a corporation created for the purpose of operating a sawmill and railroad in the promotion of the war effort during the first World War and which was wholly owned by the United States was an agency of the United States and that its property was, therefore, immune from state taxation. In describing the corporation there involved the [sic] used language peculiarly applicable to each AFB corporation: "The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends." The creation of the AFB corporations was only for the convenience of the United States to enable it to finance military construction in a manner determined by the Congress to be most conducive to the national interest. . . .'"

The limited function of the Delaware corporation, its power and purpose are aptly stated by the Michigan court in *Knapp-Stiles, Inc.*, v. *Michigan Department of Revenue*,

CCH 2 Mich. Tax Cases ¶¶ 200-202 (1962). There, as here, the contracts were for military housing under the Capehart Act. The court said relative to the corporations:

". . . In the Invitation for Bids, which is prepared and issued by the United States, acting through the Department of the Air Force, there is found in Paragraph 1, above quoted, the following:

"'The statute further contemplates that the Government-owned housing site be leased to a mortgagor or borrower corporation *which will act as a channel* for the proceeds of the mortgage loan from the lender to the successful bidder. . . .'

"And a review of the documents—the lease, the contract, and the mortgage is convincing that this is substantially the only function that the Delaware corporation do perform.

"They have no real powers except to do the bidding of the United States. . . .

". . .

"The corporations do not determine the terms of the contract. That is all done before the corporations come into existence. They do not determine whether the contract has been performed. They cannot modify its terms. They cannot terminate it.

"True, the corporations had a lease upon the premises. While this is nominally for a fifty-five year term, in fact, the actual possession, maintenance and operation of the housing is in the hands of the United States and its Air Force as soon as the housing is ready for occupancy.

"The United States alone determines the terms of the contract. It alone can modify or terminate it. It alone determines when it has been performed."

An analysis of *In re S. S. Silberblatt, Inc.*, v. *Tax Comm. of the State of New York*, 5 N.Y. (2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), cited by the majority, discloses that the opinion is based on the erroneous premise that the Delaware corporations were ". . . created for a commercial purpose for private profit, as distinguished

from a governmental purpose." As heretofore stated, consideration of the housing contract in its entirety cannot support such a conclusion. The analysis of the housing contract and the reasoning of the dissent in the *Silberblatt* case is correct.

". . . Although under our State law the tax is imposed upon the recording of the mortgage (*Franklin Soc.* v. *Bennett*, 282 N.Y. 79), this case is controlled by Federal law under which the tax is on the mortgage itself, which is a Federal instrumentality exempt from State taxation (*Federal Land Bank* v. *Crosland*, 261 U.S. 374; . . .). Unlike the Wherry Act, the Capehart Act, under which this military housing project was authorized, renders petitioner-appellant merely a builder and not a private sponsor of the military housing. The United States, through its Department of Defense, is the sponsor, financier and owner of the entire project. The mortgagor corporations are mere fictions, and they and the mortgagee banks had no other function in this business than to act as agents for the Federal Government (*Clallam County* v. *United States*, 263 U.S. 341, 345, 44 S.Ct. 121, 68 L.Ed. 328; *Railroad Co.* v. *Peniston*, 18 Wall 5, 42, 85 U.S. 5, 42, 21 L.Ed. 787) . . ."

The majority attempt to distinguish the *Clallam County* case on the basis that the corporation there had no purpose other than to produce war materials for the United States government, and it quotes from the *Clallam County* case as follows:

". . . This is not like the case of a corporation having its own purposes as well as those of the United States. . . ."

The inference from this quotation which is desired by the majority is that the Delaware corporation had purposes other than those of the United States government. This is erroneous and unsupported by the record.

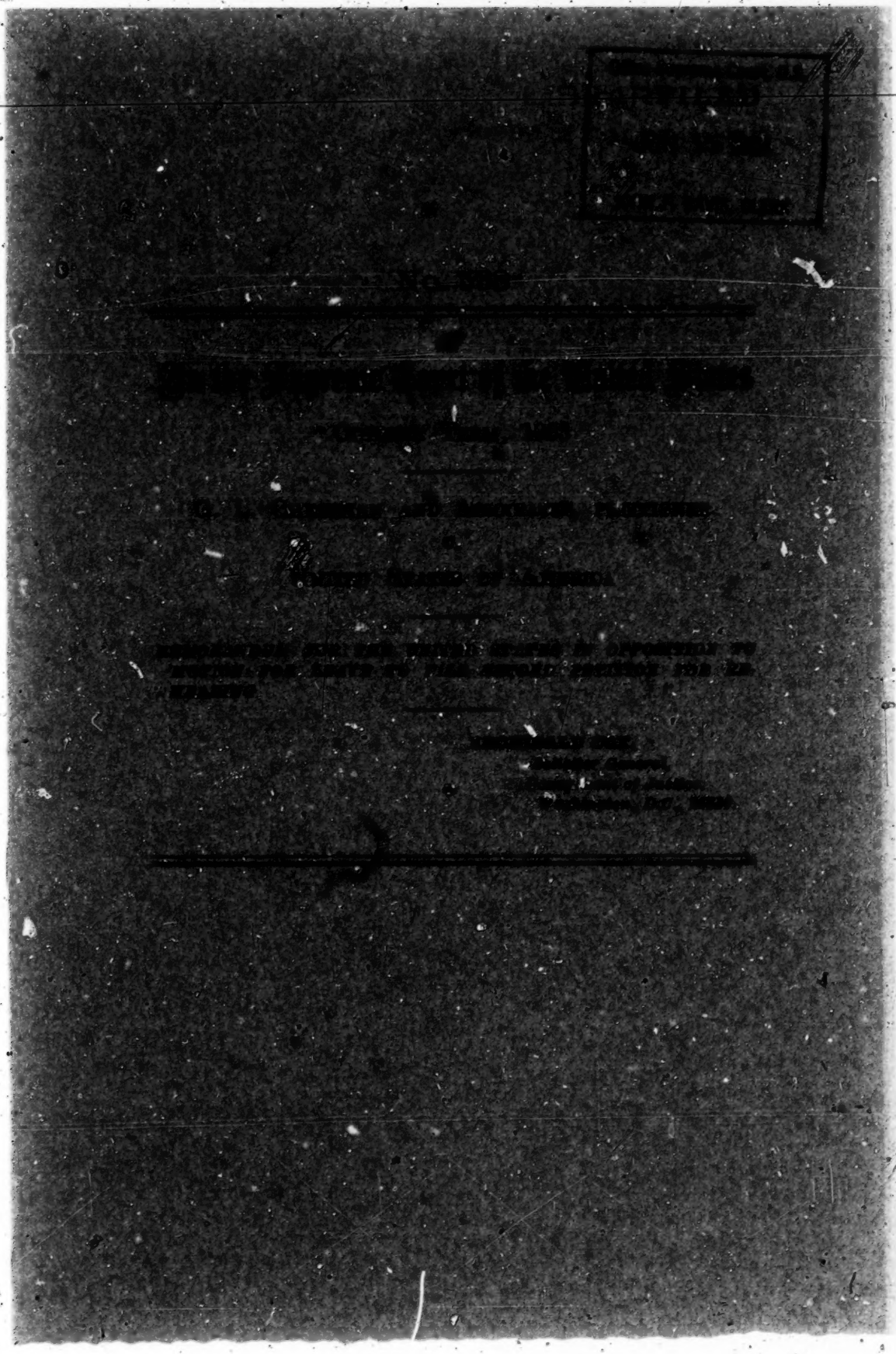
The holding of the cases cited by the majority, *E. I. Du Pont de Nemours & Co.* v. *State*, 44 Wn.(2d) 389, 267 P.(2d) 667 (1954), and *United States* v. *Brown*, 41 F.Supp. 838

(1941), is not inconsistent with the *Clallam County* case since the corporations, in those cases, were not instrumentalities of the United States because they had separate commercial purposes for private profit.

In the instant case we should hold that, although the mortgagor-builder is the "buyer" to whom the retail sale of the housing project construction was made, it was nothing more than an instrumentality of the United States government; that it had no commercial purpose other than for the convenience of the United States, serving as a means to the end of obtaining this military housing; and that the sovereign immunity of the federal government applies.

The judgment of the trial court should be reversed, and the cause remanded with instructions to enter judgment restraining the Tax Commission from imposing the tax and to permit recovery of the tax which appellants paid under protest.

HILL, DONWORTH, and WEAVER, JJ., concur with HUNTER, J.



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 538

G. L. CHRISTIAN AND ASSOCIATES, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

Petitioner's present motion alleges that the decision of the Court of Claims on which review is sought conflicts with *Murray* v. *Washington*, 384 P. 2d 337 (Sup. Ct. Wash., August 1, 1963), appeal pending, No. 851, this Term.[1] We submit that there is no conflict between these decisions and that the present motion should in any event be denied by reason of untimeliness.

In *Murray* v. *Washington*, *supra*, and its companion cases, it was held that the State of Washington could

[1] Decided by the Supreme Court of Washington in the same opinion, and also pending before this Court, are *Inland Empire Builders, Inc., et al.* v. *Washington*, No. 849, and *Herb and Varodick, et al.* v. *Washington*, No. 850. Pursuant to an order of this Court dated May 4, 1964, the Solicitor General has filed a memorandum in these cases expressing the view that probable jurisdiction should be noted.

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assess a retail sales tax against a construction contractor in a Capehart Act project, on the ground that the contractor should have collected the tax from the mortgagor-builder, which is the corporation whose function it is to lease the construction site from the United States and to pay the contractor out of the proceeds of an FHA-guaranteed mortgage loan. The court ruled that (1) the mortgagor-builder, rather than the United States, was the "buyer" on whom the State statute imposed the tax, and (2) the mortgagor-builder was not a federal instrumentality for purposes of immunity from State taxation.

One of the issues in the present case is whether Section VIII of the Armed Forces Procurement Regulations, 32 C.F.R. Part VIII, applied to Capehart Act housing contracts. These Regulations govern "contracts made by the Department of Defense * * * for the procurement of supplies * * * which obligate appropriated funds." The only issue argued by petitioner with respect to the applicability of this language was whether the housing contract could be deemed to "obligate appropriated funds." (Pet. 21–24.) The Court of Claims held that the contract did "obligate appropriated funds," because of the FHA guaranty and the contingent obligation of the United States to assume the mortgage. This holding as to the meaning of the regulations has no bearing whatever on the two grounds of decision in the *Murray* case. For the construction of the words "obligate appropriated funds" obviously has nothing to do with the meaning of the word "buyer" in the Washington tax statute; nor is it relevant to the

question whether the mortgagor-builder is a federal instrumentality for purposes of immunity from State taxation.

Moreover, the decision of the Supreme Court of Washington was rendered on August 1, 1963, well before the filing of the petition for a writ of certiorari in this case on October 10, 1963. Petitioner's sole excuse for the delay to date is that the Jurisdictional Statement in *Murray* was not filed until February 15, 1964, almost four months ago. Even if there were a conflict in decisions—which there clearly is not—this justification would be inadequate, particularly since the same alleged conflict existed when the petition for certiorari in this case was filed. As petitioner notes, *S. S. Silberblatt, Inc.* v. *Tax Comm'r*, 5 N.Y. 2d 635, 159 N.E. 2d 195 (1959), certiorari denied, 361 U.S. 912, also involved the question of whether a State tax could be imposed on the mortgagor-builder of a Capehart Act project.

For the foregoing reasons, petitioner's motion should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JUNE 1964.

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